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The Justification for Protecting Reasonable Expectations

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THE JUSTIFICATION FOR PROTECTING REASONABLE EXPECTATIONS

*Bailey H. Kuklin**

CONTENTS

I. INTRODUCTION.....	864
II. THE REASONS FOR PROTECTING REASONABLE EXPECTATIONS	867
A. <i>Deontology</i>	867
B. <i>Corrective Justice</i>	869
C. <i>Distributive Justice</i>	875
D. <i>Intuitive Justice</i>	877
E. <i>Teleology</i>	879
F. <i>Economics</i>	881
G. <i>Miscellaneous</i>	883
III. HARD CASES.....	884
A. <i>The Psychology of Expectations</i>	884
1. The Desirability of the Expectations.....	884
2. The Investment in the Expectations.....	887
B. <i>Expectations Based on Ignorance of the Law</i>	889
C. <i>Expectations Contrary to Known Law</i>	892
D. <i>Expectations in an Unjust Regime</i>	894
E. <i>Expectations When the Law Is Undeveloped or Murky</i>	898

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F. <i>Actual Expectations Contrary to Favorable Reasonable Expectations</i>	899
G. <i>Expectations During Periods of Legal Evolution</i>	902
IV. CONCLUSION	905

I. INTRODUCTION

The protection of reasonable expectations has been advanced as a central principle in various areas of the law, including contracts, torts, and property, or aspects of them.¹ It has even been championed as the overarching principle of the law in general.² But, despite this prominence, the principle has received scant attention from commentators. Most of those who have closely attended to it have found that the principle is not useful. Finding that the existing law essentially animates reasonable expectations, they conclude that the principle of legally protecting reasonable expectations leads to a circularity: The law is supposed to protect reasonable expectations that are themselves aroused by the law.³ Elsewhere, the Author examines the plausibility of the principle of legally protecting reasonable expectations and rejects the conclusion that it is to be dismissed as mere circularity or tautology.⁴ Instead, the Author argues that the relationship between existing law and reasonable expectations is to be viewed as a mutual feedback

1. See, e.g., P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 105-07, 138, 576-77, 761-63 (1979) (explaining that property rests on expectations, and noting that the concept of expectations has been extended to reach contract and tort law); Robert E. Goodin, *Compensation and Redistribution*, in *COMPENSATORY JUSTICE* 143, 151-53 (John W. Chapman ed., 1991) (noting that compensatory justice in general is grounded on the protection of reasonable expectations). For additional references, see Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 19 n.1 (1997).

2. See ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 189 (1922) [hereinafter POUND, *THE PHILOSOPHY OF LAW*] ("Looking back over the whole subject, shall we not explain more phenomena and explain them better by saying that the law enforces the reasonable expectations arising out of conduct, relations and situations . . ."); see also ROSCOE POUND, *SOCIAL CONTROL THROUGH LAW* 80-81 (Transaction Publishers 1997) (1942) (noting that nearly all legal rights are "conferred consciously and intentionally . . . as a recognition of reasonable expectations").

3. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 322, 322 & n.32 (1981) (containing further citations); P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 LAW Q. REV. 193, 214 (1978); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 275 (1986); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 59-60 (1936); C. Robert Morris, *Some Notes on "Reliance,"* 75 MINN. L. REV. 815, 815, 818 (1991).

4. See Kuklin, *supra* note 1, at 32-38 (providing an alternative understanding of the circularity problem).

mechanism.⁵ The law informs reasonable expectations and reasonable expectations inform the law.⁶ Each one affects the other in a dynamic relationship that leads to harmony and stability when they both align, but dissonance and instability when they are out of synch as, for example, when social mores undergo rapid change. In this latter circumstance, social pressure on the law pushes it to catch up with expectations, while, at the same time, the existing law puts the breaks on evolving expectations. Tension and social dissatisfaction persist until there is an accommodation between the law and expectations,⁷ as was apparent during the period of prohibition.

Although the principle of protecting reasonable expectations is coherent and independent, one cannot conclude that it can be mustered by courts and commentators as the touchstone for resolving closely balanced controversies. One intractable problem prevents the principle from being useful as a tie-breaker: There is no principled way of characterizing reasonable expectations. It is an essentially contested concept.⁸ There are an infinite number of ways to describe correctly a person's expectations, each one valid from a purely analytical point of view, but each one of them has potentially distinct ramifications for legal and normative conclusions. For example, a person may reasonably expect, among others, the following: a promise supported by consideration would be enforceable; an unconscionable provision in a contract would not be enforceable; court rulings are occasionally "unprecedented"; and injustice sometimes occurs in the legal system. In light of the applicability of all four of these characterizations to a single interaction, which way the principle of protecting reasonable expectations cuts depends on the characterization adopted. This cannot be determined by the principle alone. Other considerations must be brought to bear. Thus, the principle acts as a dull blade rather than the honed scalpel needed to incise fine lines for judicial decision making in close cases. Because of this inexactitude, it can serve only as a vague

5. See *id.* at 33.

6. See *id.* at 34-35.

7. See *id.* at 33-34.

8. William Connolly, borrowing from W.B. Gallie, champions the following idea: When the concept involved is *appraisive* in that the state of affairs it describes is a valued achievement, when the practice described is *internally complex* in that its characterization involves reference to several dimensions, and when the agreed and contested rules of application are relatively *open*, enabling parties to interpret even those shared rules differently as new and unforeseen situations arise, then the concept in question is an "essentially contested concept."

WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10 (3d ed. 1993).

principle shedding light on one of the causes of the controversy, not as an arbiter of the controversy.

The aim of this Article is not an analytic one of further examining the principle of protecting reasonable expectations, but rather a normative one of investigating whether the principle, even if able to provide refined resolutions of legal conflicts, can be coherently justified. To this end, the principle of protecting reasonable expectations is first situated in the most common moral traditions: deontology, corrective justice, distributive justice, intuitive justice, teleology, and a small miscellany. Then, two factors that seem to influence the justification of protecting reasonable expectations are examined: the desirability of the expectations and the psychology of expectations. When expectations align with an established rule, it is easy to argue that they are reasonable, unless the rule itself is well beyond the pale. But there are hard cases in which the outcomes do not conform to expectations that most would consider reasonable. The disappointed expectations may be based on incorrect legal advice. They may be common but contrary to established law. They may be aroused in an unjust regime. The law may be undeveloped or murky. The actual expectations may be contrary to favorable reasonable expectations. They may occur in a period of rapid legal evolution. Resolving these hard cases further puts into doubt satisfactory justifications for the principle.

As a prelude to discussing the normativity of the principle, a definition and brief exposition of reasonable expectations is needed. The principle the Author develops and defends elsewhere is:

Expectations are reasonable when a person, passably acquainted with the state of the law and the legal process (which includes the currently accepted morals, mores, customs and usages, and, in sum, the general social milieu), foresees that the occurrence of a particular contingency is likely to receive proper legal protection.⁹

Among the salient features of this definition is the proposition that the state of the law and the legal process encompass the broad social forces that inform the community's outlook.¹⁰ Sophisticated persons know that, to predict the legal consequences of contemplated actions, they must not only be familiar with the law on the books but also with the winds of change that may impinge on existing rules. The observant notice that expectations aroused by dissatisfaction with existing positive

9. Kuklin, *supra* note 1, at 25; *see also id.* at 23-29.

10. *See id.* at 25-29.

law sometimes lead to modification of the rules at the same time that the rules themselves serve as a gravitational center that tugs on existing expectations. The law and reasonable expectations are linked by a feedback loop with each influencing the other. Excluded from this loop are the conative processes of the parties, such as their desires, hopes, and wants. Wishful thinking, among other things, does not draw the support of the law. The observant also notice that expectations, even reasonable expectations, are affected by one's viewpoint. Since, on the one hand, individuals seek to protect reasonable expectations and not ideal expectations, they do not demand the antagonistic parties to have perfect knowledge of their situation and the relevant law. Owing to their differing perspectives and understandings, they may have inconsistent expectations, both of which are reasonable. But, on the other hand, the expectations must be reasonable, not merely actual. The protected expectations are cleansed of undue foibles by looking to the reasonable person in the shoes of the particular party, thereby basing the standard on what might be called "situated objectivity." Still, in the end, because reasonable expectations may conflict, this alone diminishes the principle of protecting reasonable expectations as a touchstone. To see whether there are any virtues to even offering the principle as a legal guide, this Article turns to the question of what justifies the promotion of reasonable expectations when they do not coincide with the law.

II. THE REASONS FOR PROTECTING REASONABLE EXPECTATIONS

The essential policy grounds for upholding the principle of protecting reasonable expectations are fairly straightforward. In this Part, various justice and utility analyses are mustered to support the notion of protecting reasonable expectations: deontology, corrective justice, distributive justice, intuitive justice, teleology, economics, and, at the end, a small miscellany. It will be discovered that the support is strong, but not unqualified. Other principles and policies sometimes circumscribe the legal reach of the espoused principle.

A. *Deontology*

From a deontological viewpoint—a Kantian one for convenience and currency—under which the requirements of justice dominate the concerns for promoting preferred consequences or utility," the

11. See RICHARD B. BRANDT, *ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS* 354-55 (1959); WILLIAM K. FRANKENA, *ETHICS* 16-17 (2d ed. 1973); JOHN

protection of reasonable expectations follows from the central importance of respecting the autonomy of rational, ethical beings. It is an aspect of human nature that expectations are aroused by predictions of future occurrences or states of affairs. Reliable predictions are essential to the rational life.¹² Without them, an individual cannot order her life in a coherent, integrated manner. To be capable of exercising one's autonomous will in a significant sense, one's considered choices must not simply be shots in the dark. When an individual is relegated to taking blind aim because of unpredictable consequences, the choice is not meaningfully reflective of her will. It does not manifest her essence or humanity.¹³ For example, if she is unavoidably ignorant of the possible effects of available options for a necessary action, one would not deem her immoral for a choice harmful to another person, nor would one find her deserving, in a strong sense anyway, of the benefits of the ensuing blind luck.¹⁴ In sum, one can hardly be considered an autonomous, moral person responsibly conducting one's own affairs if the consequences of one's actions are substantially unexpected.¹⁵ Just as

RAWLS, A THEORY OF JUSTICE 30 (1971). This is not to say that deontological theories ignore consequences. "All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy." *Id.*

12. Robert Nozick refers to two themes that permeate the philosophical literature on rationality: rationality as a "matter of reasons" and "rationality [a]s a matter of reliability." ROBERT NOZICK, THE NATURE OF RATIONALITY 64 (1993).

13. These observations recall Lon L. Fuller's "internal morality of law" whereby a system of legal rules, by its very nature, must satisfy certain requisites—in general, those qualities necessary for rational compliance by the citizens. See LON L. FULLER, THE MORALITY OF LAW 38-39 (rev. ed. 1969).

14. Similarly, the deontological judgment of a person would consider whether she has physical or mental disabilities that make ordinary interaction with the world unpredictable to her, i.e., "shots in the dark." See Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment, Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 650 (2000) (stating that, under the deontological approach, "the existence and degree of a human agent's moral responsibility are critical to whether the agent deserves moral blame").

15. See MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 143 (1986) ("Without a certain degree of predictability one's exercise of one's freedom of will becomes pointless."). See generally Bailey Kuklin, *The Asymmetrical Conditions of Legal Responsibility in the Marketplace*, 44 U. MIAMI L. REV. 893, 960-66 (1990) (discussing that "one is not blameworthy for the consequences of an action that are not reasonably foreseeable"). But cf. George Sher, *Liberal Neutrality and the Value of Autonomy*, 12 SOC. PHIL. & POL'Y 136, 137 (Winter 1995) (stating that while "a person may . . . act unfreely because he lacks the information to evaluate his options[,] . . . [i]t is also not obvious that persons can never . . . exercise autonomy despite their ignorance of relevant features of their situation"). The notion that one is not morally responsible in a strong sense for unexpected consequences is supported by Immanuel Kant's canon that "ought implies can." J.R. Lucas, *Or Else, in MORAL PROBLEMS: A COLLECTION OF PHILOSOPHICAL ESSAYS* 222, 235 (James Rachels ed., 1971) ("[I]f a man was not capable of rational choice at the time of the offence, then the imperative major premiss 'Do not do it, or else' cannot have been properly addressed to him, and we cannot acquire any warrant for

the purchase of a "pig in the poke" is an expression epitomizing the contract of a fool,¹⁶ so would be the pejorative characterization of any avoidable choice of significance in which the party had little idea of what was in store.

B. Corrective Justice

The deontologist's concern for justice with respect to reasonable expectations may be examined from another angle. Aristotle introduced two types of justice, corrective and distributive.¹⁷ Corrective justice "plays a rectifying part in transactions between man and man," both voluntary (e.g., contract) and involuntary (e.g., negligence).¹⁸ To generalize beyond some readings of Aristotle's version of corrective justice, when one person injures or harms another, the first should compensate the second.¹⁹ There are various standards proposed for this corrective principle. Under strict liability, a strong standard, one is liable irrespective of moral blameworthiness.²⁰ If A directly harms B,

carrying out the 'Or else.'). J.L. Mackie discusses the structure of a right-based moral theory by assigning "some basic abstract *prima facie* rights" which include "a right to the fulfillment of reasonable expectations based on a fairly stable system of laws, institutions, and practices." J.L. Mackie, *Rights, Utility, and Universalization*, in *UTILITY AND RIGHTS* 86, 87 (R.G. Frey ed., 1984); see also J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 129-30 (1977) (noting that rights are "legitimate and authorized expectations"). Charles Fried notes that, once a legal right is established, even when it is granted only to promote efficiency, the right-holder deserves protection from violations by society for moral, categorical reasons in order not to abuse "his trust and confidence." See CHARLES FRIED, *RIGHT AND WRONG* 138-39 (1978); see also FULLER, *supra* note 13, at 39-40 (noting the "bond of reciprocity" between government and citizens). Respected rights produce predictability and security. "[J]ust because rights are those moral commodities which delineate the areas of entitlement, they have an additional important function: that of defining the respects in which one can reasonably entertain certain kinds of expectations." Richard Wasserstrom, *Rights, Human Rights, and Racial Discrimination*, in *RIGHTS* 46, 49 (David Lyons ed., 1979); see also BRIAN BARRY, *POLITICAL ARGUMENT* 102 (1965) (arguing that, where individuals act based on the belief that a particular state of affairs will continue, "it is wrong for this state of affairs to be suddenly changed").

16. For the modern citifolk among the readers, a poke is "[a] sack or bag." *THE AMERICAN HERITAGE SCHOOL DICTIONARY* 680 (1977). The image evoked is of a person offering for sale the contents of a closed sack, allegedly a pig, without allowing an inspection. See *id.*

17. See ARISTOTLE, *ETHICA NICOMACHEA*, bk. V (W.D. Ross ed., 1942).

18. *Id.* at 1130. For an extended analysis of the application of corrective justice to the private law, and the view that it is the driving force of the private law, see ERNEST J. WEINRUB, *THE IDEA OF PRIVATE LAW* (1995).

19. See, e.g., RICHARD A. EPSTEIN, *A THEORY OF STRICT LIABILITY: TOWARD A REFORMULATION OF TORT LAW* 5 (1980) (stating that, under tort law, a defendant who causes harm must compensate the plaintiff).

20. See *id.* (providing that, under strict liability, a defendant is liable regardless of whether she intended to harm the plaintiff).

then *A* must compensate *B* for the harm.²¹ Irrespective of whether *A* had reason to believe her conduct would harm *B*, she must pay.²² *A*'s reasonable expectations of the consequences of her act are irrelevant.²³ Strict liability, because it is unlinked to *A*'s mental state, was rejected by Aristotle and makes many observers uncomfortable.²⁴ Since the harm to *B* was not anticipated, *A* is not blameworthy. She does not deserve to suffer for unavoidable losses. Most believe that liability should turn on blameworthiness.²⁵ The defenders of strict liability must look elsewhere for justification. Among the warrants are the economic policies of cost internalization,²⁶ and risk avoidance.²⁷

The common law tort system generally embraces a principle of corrective justice weaker than strict liability.²⁸ Under the negligence standard, if *A* injures *B* through faulty behavior, then *A* must compensate *B* to the extent of the injury.²⁹ Roughly speaking, legal fault

21. See *id.* at 23-25. Richard Epstein proposes a strict liability standard. See generally *id.*

22. See *id.* at 5.

23. See *id.* at 25.

24. See, e.g., H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 20 (1968) ("[S]trict liability' is generally viewed with great odium and admitted as an exception to the general rule, with the sense that an important principle has been sacrificed to secure a higher measure of conformity and conviction of offenders."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 22 (W. Page Keeton ed., 5th ed. 1984); J.R. LUCAS, THE PRINCIPLES OF POLITICS 240 (1966) (explaining that in defending strict liability, "always we feel that Justice is being sacrificed, and often . . . to an unwarranted extent"). See generally Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259, 282 (1976) (discussing moral arguments against the strict liability rule); Ernest J. Weinrib, *Liberty, Community, and Corrective Justice*, in LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS 290, 310-13 (R.G. Frey & Christopher W. Morris eds., 1991) (identifying problems associated with the theory of strict liability).

25. See KEETON ET AL., *supra* note 24, § 4, at 22. For the proposition that strict liability is not as strict as its title suggests, see, for example, EPSTEIN, *supra* note 19, at 133; HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 343 (1979); MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 53 (1984) ("A mental element is built into all strict liability rules because of their requirement that the actor at least have performed a voluntary action . . .").

26. See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 100 (2d ed. 1989); William Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, 12 J. LEGAL STUD. 241, 245-46 (1983); James A. Henderson, Jr., *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1039, 1040-41 (1980). See generally KEETON ET AL., *supra* note 24, § 85, at 609-12 (discussing "The Strict Accountability Principle").

27. See, e.g., GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 135-73 (1970) (explaining "General Deterrence"); GROSS, *supra* note 25, at 351-52 (describing "encouragement of precaution"); George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 128-32 (1982).

28. See Stephen A. Kiholm, *Corrective Justice as the Redress of Wrongful Gain*, 18 MEM. ST. U. L. REV. 267, 267, 268 (1988) (stating that traditional tort law is a form of "'corrective justice' between two parties based on a moral concept of fault").

29. See KEETON ET AL., *supra* note 24, § 43, at 280.

tracks blameworthiness.³⁰ Most courts construe the elements of the negligence action to require foreseeability.³¹ The harmful consequences of the act must be foreseeable to the reasonable person for the actor to be liable.³² Reasonable expectations, foreseeability, and blameworthiness are inextricably intertwined in the common moral consciousness.³³

But the negligence standard and the idea of blameworthiness do not completely overlap. First, "fault" is not the exact equivalent of moral blameworthiness.³⁴ There are "faulty" actions giving rise to liability that are not morally blameworthy in a strict sense.³⁵ For example, "[t]he law finds 'fault' in a failure to live up to an ideal standard of conduct which may be beyond the knowledge or capacity of

30. See, e.g., *id.* § 4, at 23 ("In short, it is undoubtedly true that in the great majority of the cases liability in tort rests upon some moral delinquency on the part of the individual."); David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 723 (1992) ("In the final analysis, however, whether the law of torts turns to freedom, vested rights, equality, or utility as the primary determinant of responsibility for harm, it rests at bottom on principles of moral fault."). For the roughness in the tracking between legal fault and blameworthiness, see, for example, JULES L. COLEMAN, *RISKS AND WRONGS* 212-33, 329-60 (1992) and Kiholm, *supra* note 28, at 286-90.

31. See, e.g., KEETON ET AL., *supra* note 24, § 43, at 280 n.1 (citing case law recognizing foreseeability as a requirement for liability under negligence law). Prosser and Keeton state that negligence "necessarily involves a foreseeable risk. . . . If one could not reasonably foresee any injury as the result of one's act, or if one's conduct was reasonable in the light of what one could anticipate, there would be no negligence, and no liability." *Id.* § 43, at 280; see also *id.* § 31, at 170 ("The idea of risk in th[e] context [of negligence law] necessarily involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may possibly follow.").

32. See *id.* § 43, at 280.

33. Holmes discusses this notion in the context of the criminal law:

All foresight of the future, all choice with regard to any possible consequence of action, depends on what is known at the moment of choosing. An act cannot be wrong, even when done under circumstances in which it will be hurtful, unless those circumstances are or ought to be known.

O.W. HOLMES JR., *THE COMMON LAW* 55 (Boston, Little, Brown, & Co. 1881); see also *id.* at 80-85 (providing a similar argument regarding tort liability). Holmes points out that the crucial knowledge relates both to the present and the future state of affairs: "Ignorance of a fact and inability to foresee a consequence have the same effect on blameworthiness. If a consequence cannot be foreseen, it cannot be avoided." *Id.* at 56. Robert E. Goodin addresses the normative implications of foreseeability in more general terms: "On the expectations-based argument, what is wrong is not altering the status quo but rather altering it unpredictably." Goodin, *supra* note 1, at 157. As a practical matter, John Stuart Mill, the utilitarian, observed: "'The commonest person lives according to maxims of prudence founded on foresight of consequences.'" ATTYAH, *supra* note 1, at 432 (quoting John Stuart Mill). For the proposition that the foreseeability standard faces the question of whether it is based on actual foresight or normatively imputed foresight (what the reasonable person should foresee), see MICHAEL SALTMAN, *THE DEMISE OF THE 'REASONABLE MAN': A CROSS-CULTURAL STUDY OF A LEGAL CONCEPT* 19 (1991).

34. See KEETON ET AL., *supra* note 24, § 4, at 22-23.

35. See *id.* § 4, at 22.

the individual, and in acts which are normal and usual in the community, and without moral reproach in its eyes."³⁶ Second, once *A* is found to be negligent for injuring *B*, then, depending on the jurisdiction or circumstances, *A* may be liable for the full extent of *B*'s injury even if that injury is greater in degree or different in kind from that foreseeable.³⁷ The fault standard of negligence, even when parallel to moral blameworthiness, is employed as a threshold test that triggers complete liability for the injury regardless of the extent of the blameworthiness.³⁸ In other words, once *A* is blameworthy enough to be liable, *A*'s liability may greatly exceed (or fall short of) the quantified blameworthiness.³⁹

The additional liability for unanticipated injuries must be examined more closely. In one sense, when *A* foresees the possibility of harming *B*, yet does not sharply foresee the nature or extent of the possible harm, the greater liability is still "expected." Since *A* is acquainted with the relevant legal principles, she is aware of, and can somewhat anticipate, the potential liability. The inherent risk and uncertainty muddy her expectations, but in principle, she probabilistically anticipates the liability exposure enough, for example, to consider insurance protection.⁴⁰ But, despite this line of reasoning, at some point the

36. *Id.* (footnote omitted); see also HOLMES, *supra* note 33, at 108 ("The rule that the law does, in general, determine liability by blameworthiness, is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that."). Prosser and Keeton continue: "It will impose liability for good intentions and for innocent mistakes. . . . On the other hand, there are still many immoral acts which do not amount to torts, and the law has not yet enacted the golden rule." KEETON ET AL., *supra* note 24, § 4, at 22-23.

37. See KEETON ET AL., *supra* note 24, § 43, at 290. Furthermore, if *A*'s conduct foreseeably puts *B* at risk, then *A* may be liable for an unforeseeable injury to *C*. See generally *id.* § 43, at 284-89 (explaining "Unforeseeable Consequences"). "There is perhaps no other one issue in the law of torts over which so much controversy has raged, and concerning which there has been so great a deluge of legal writing." *Id.* § 43, at 280.

38. See *id.* § 4, at 22 (stating that, in various areas of liability, "defendants are held liable for well-intentioned and entirely reasonable conduct"); see, e.g., *Moolekamp v. Rubin*, 531 So. 2d 1124, 1126-27 (La. Ct. App. 1988) ("If plaintiff can prove that defendant's breach of a legal duty . . . caused . . . harm to befall plaintiff, defendant's liability to plaintiff is established regardless of the extent of damage . . .").

39. Prosser and Keeton present the tort "fault principle": "When blameworthy conduct causes harms to others, the blameworthy actor ought, in general, to compensate for those harms." KEETON ET AL., *supra* note 24, § 85, at 608. This additional liability also exists in the criminal law. See HOLMES, *supra* note 33, at 59 ("The law may . . . throw on the [criminal] actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends.").

40. See Melvin Simensky & Eric C. Osterberg, *The Insurance and Management of Intellectual Property Risks*, 17 CARDOZO ARTS & ENT. L.J. 321, 321 (1999) (discussing the

anticipation of the "barely expected" becomes so diminished by its improbability as to hardly give rise to "reasonable expectations."⁴¹ Under the existing doctrine of most jurisdictions, this does not avert liability when some injury is foreseeable. At this point, when the risk and uncertainty are profound, liability diverges from moral blameworthiness. The legal system imposes additional liability for improbable injuries for other reasons. One reason is that, although the injurer is not particularly blameworthy for initiating the unforeseeable consequence, the victim is not blameworthy in the least.⁴² As between the two, the injurer is relatively less blameless and should suffer the ultimate loss.⁴³

The reasoning behind this closer examination of liability in negligence for unanticipated injuries can also be applied to some instances of strict liability. When, for example, a manufacturer contemplates mass production of widgets, though it does not foresee that any particular widget will injure a user, it does foresee that some injuries will result from those widgets that are defective despite its exercise of due care. The more it produces, the more certain it is of resulting injuries. It is, after all, taking due care, not perfect care, which under the Hand formula essentially requires an efficient trade-off between the costs of additional care and reduced probable injuries.⁴⁴ Being passably acquainted with the law of strict products liability, the producer reasonably expects, probabilistically anticipates, its liability exposure. As the number of widgets produced decreases, the likelihood of causing injury also decreases. At some point the producer will declare that because the number of widgets produced is so small, it does not foresee any resulting injuries, while admitting that it does

importance of risk management devices, such as insurance, in the context of increased risk for intellectual property owners and users due to increased litigation in the field of intellectual property).

41. In other words, "[n]o person can be expected to guard against harm from events which are not reasonably to be anticipated at all, or are so unlikely to occur that the risk, although recognizable, would commonly be disregarded." KEETON ET AL., *supra* note 24, § 31, at 170.

42. See HOLMES, *supra* note 33, at 83-84.

43. See, e.g., *id.* at 84 ("As between the two, the party whose voluntary conduct has caused the damage should suffer, rather than one who has had no share in producing it."). The economic arguments above which endorse strict liability also generally support liability for improbable injuries. See Timothy D. Lytton, *Responsibility for Human Suffering: Awareness, Participation, and the Frontiers of Tort Law*, 78 CORNELL L. REV. 470, 471, 477 (1993) (providing a paradigm of responsibility under which an individual is responsible even for unanticipated consequences of her actions).

44. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.1, at 104-07, § 6.7, at 112-13 (1973).

reasonably expect, because of the law of strict products liability, that, if there is an injury, it will be liable.⁴⁵ Because the manufacturer exercises due care, society has compunctions, despite the statistical certainty that injuries will result, about proclaiming it blameworthy. In this case, liability diverges not only from moral blameworthiness, but also from reasonable expectations, since they are tightly coupled to the likelihood of injury from a particular widget.

To summarize the discussion of corrective justice, although the notion as implemented under the common law does support the proposition that reasonable expectations, being linked to foreseeability and blameworthiness, are to be legally protected in the lion's share of cases,⁴⁶ the common law also goes beyond the confines of the proposition in some circumstances, or it sorely tests the sweep of those confines. While the proposition may provide a beacon, a close look finds shadows cast by other legal principles and policies, such as risk avoidance,⁴⁷ cost internalization,⁴⁸ and the relative equities regarding "two innocent parties,"⁴⁹ which create pockets of various forms of strict liability dissociated from expectations other than in a quite attenuated sense.

On second thought, perhaps the wrong side of the corrective justice equation is being examined. In considering the legal *protection* of reasonable expectations, the discussion has focused on an actor's expectations regarding whether she might harm another person and be held legally accountable for it. But the expectations of the actor are not protected, at least under the usual meaning of "protect." Instead, under the principle of corrective justice, it is the harmed person who is protected.⁵⁰ Her expectations are aroused accordingly. How do the expectations of the harmed person relate to the expectations of the actor? Under one analysis, they seem to track one another. To the extent the actor's reasonable expectations are informed by the likelihood of putting another person at risk,⁵¹ or being held liable for ensuing harms,

45. Parallel reasoning applies to other, discrete actions giving rise to strict liability exposure, such as the act of trekking in the woods (trespass), starting a camping fire, obtaining a pet snake, or damming a creek to create a pond. *See, e.g.,* *Keyser v. Phillips Petroleum Co.*, 287 So. 2d 364, 364-65 (Fla. Dist. Ct. App. 1973).

46. *See* EPSTEIN, *supra* note 19, at 5-8.

47. *See* CALABRESI, *supra* note 27, at 68; GROSS, *supra* note 25, at 351.

48. *See* POLINSKY, *supra* note 26, at 100-01; Bishop, *supra* note 26, at 245-46; Henderson, *supra* note 26, at 1036, 1040.

49. Michael S. Moore, *Thompson's Preliminaries About Causation and Rights*, 63 CHL-KENT L. REV. 497, 498 (1987).

50. *See supra* note 43 and accompanying text.

51. *See supra* note 31 and accompanying text.

the reasonable expectations of the person potentially harmed are protected. But, under other analyses, they may diverge. For example, one might say that the actor's reasonable expectations are informed by an accurate belief that harm to another person is exceedingly unlikely, while the reasonable expectations of the harmed person are based on the knowledge of the law of strict products liability that the harm she suffers is compensable. Or, as another example, one might say that the actor's reasonable expectations are informed by the knowledge of the law of strict products liability that the harm, however unlikely, is compensable, while the reasonable expectations of the harmed person are based on her disbelief that any injury is likely. Similar divergencies occur when examining the law of negligence. The symmetry between the expectations of the actor and the harmed person is far from perfect.⁵² But, whether the reasonable expectations of the actor and the harmed person are symmetrical, traces of the other legal principles and policies discussed above, such as those relating to blameworthiness, risk avoidance, and cost internalization, continue to invade the principle of protecting the reasonable expectations of the harmed person. Ultimately, the tie between corrective justice and reasonable expectations is loose.

C. Distributive Justice

Distributive justice, according to Aristotle, "is manifested in distributions of [public valuables such as] honour or money or the other things that fall to be divided among those who have a share in the constitution."⁵³ Each person is to receive distributions in proportion to her merit or desert.⁵⁴ Today, distributive justice considerations are employed more comprehensively to encompass issues over the propriety of legal rules.⁵⁵ The rewarding of merit is only one of the policy components.

52. Notice the uncertainty created by varying the description of the relevant expectations. It is the defensibility of this ploy, and the inability to find a principled, refined standard to prevent argumentative descriptions of the expectations in issue, that leads the Author to conclude elsewhere that the principle of protecting reasonable expectations cannot serve as a tie-breaker in close cases. See Kuklin, *supra* note 1, at 53-65.

53. ARISTOTLE, *supra* note 17, bk.V, § 2.

54. See Kiholm, *supra* note 28, at 271-76 (discussing Aristotle's view of distributive justice under which "awards should be distributed according to a person's 'merit' and in 'geometrical proportion'").

55. See *id.* at 270-71 (describing various notions of corrective and distributive justice as applied to tort law).

In discussing the relation of expectations to conceptions of distributive justice, a preliminary examination of the framework of formal, or abstract, justice⁵⁶ may help put the discussion of distributive (and corrective) justice into perspective. Under this taxonomy, maxims of justice take the following form: From each according to *X*, to each according to *Y*.⁵⁷ A material or concrete formulation of justice results from filling in the *X* or the *Y*, or both.⁵⁸ Two examples may help. The corrective justice conception of the common law negligence principle is as follows: From each according to whether through fault she injures another, to each according to consequent injury.⁵⁹ Karl Marx's famous conception of justice is: "From each according to his ability, to each according to his needs."⁶⁰ The *Y* in distributive justice formulations is often called "desert," though in a special sense.⁶¹ Among the modern conceptions of desert are virtue (merit), effort (labor), contribution to society, agreement with others, "the same thing" (equality), need(s), rank, and society's rules (legal entitlement).⁶² These may be categorized as either liberty-oriented (virtue, effort, contribution to society, and agreement with others) or equality-oriented ("the same thing," need, rank, and society's rules).⁶³ The liberty-oriented conceptions declare desert in what one does, while the equality-oriented ones seek parity within specified groupings.⁶⁴ Although liberty and equality are often incompatible, most modern theories of distributive justice embrace polycentric conceptions of desert,⁶⁵ thereby struggling to accommodate both liberty and equality.

56. See generally CH. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 11-29 (John Petrie trans., 1963) (discussing various formulations which attempt to define abstract or formal justice).

57. See *id.* at 15 (describing use of "mathematic" variables to yield conceptions of justice).

58. See *id.* at 17-26 (discussing various formulations of abstract, or formal, justice, such as equality, merit, works, need, rank, and legal entitlement).

59. See Kiholm, *supra* note 28, at 270-71.

60. Robert W. McGee, *Is Tax Evasion Unethical?*, 42 U. KAN. L. REV. 411, 432 (1994) (quoting KARL MARX, *CRITIQUE OF THE GOTH A PROGRAM* 27 (Foreign Languages Publ'g House 1954) (1875)).

61. See Diana T. Meyers, *Introduction to ECONOMIC JUSTICE: PRIVATE RIGHTS AND PUBLIC RESPONSIBILITIES* 1, 2 (Kenneth Kipnis & Diana T. Meyers eds., 1985).

62. See PERELMAN, *supra* note 56, at 6-11 (describing the "conceptions of justice"); NICHOLAS RESCHER, *DISTRIBUTIVE JUSTICE: A CONSTRUCTIVE CRITIQUE OF THE UTILITARIAN THEORY OF DISTRIBUTION* 73-83 (1966) (discussing the "canons of distributive justice"); Meyers, *supra* note 61, at 1-2 (explaining the "conceptions of personal desert").

63. See Meyers, *supra* note 61, at 2.

64. See PERELMAN, *supra* note 56, at 7-10, 17-25; Meyers, *supra* note 61, at 1-2.

65. See Meyers, *supra* note 61, at 2.

The relation of expectations to distributive justice may now be briefly stated. Liberty-oriented conceptions of desert are inextricably linked to reasonable expectations, which themselves are tied to foreseeability. As suggested above in the Section on deontology, in a meaningful sense one can hardly be said to be at liberty, to be free, when one is liable for unavoidable, blind choices.⁶⁶ One can hardly demonstrate virtue, realize a considered effort, contribute to society, or meet agreements if one cannot foresee the consequences of, or formulate reasonable expectations about, one's actions. Equality-oriented conceptions of desert, to the contrary, are not tightly linked to expectations. While reliable expectations are essential to the human condition, and for that matter, the animal condition (it is generally fit for even a bee to be able to distinguish between being bumped and being attacked, though "killer bees" may need Lamarckian instruction), a person's expectations are not essential to membership in a grouping. In particular, one's expectations do not govern, or only weakly govern, whether one is equal, needy, or aristocratic. In general, then, reasonable expectations are integral to some conceptions of distributive justice, but not to others.⁶⁷

D. *Intuitive Justice*

Theoretical analysis aside, there is a tendency to equate the dashing of reasonable expectations with injustice.⁶⁸ To put it bluntly, as a matter of brute fact, people believe it is unjust for their reasonable expectations to be disappointed and that's that.⁶⁹

66. See *supra* note 15 and accompanying text.

67. John Rawls ties distributive justice to legitimate expectations. See RAWLS, *supra* note 11, at 310-15. While ideally distributive justice turns on moral desert, "[t]here seems to be no way of defining the requisite criterion" in the original position, and "the notion of distribution according to virtue fails to distinguish between moral desert and legitimate expectations." *Id.* at 310-11. Thus, "[h]aving done various things encouraged by the existing arrangements, [persons and groups] now have certain rights, and just distributive shares honor these claims. A just scheme, then, answers to what men are entitled to; it satisfies their legitimate expectations as founded upon social institutions." *Id.* at 311.

68. See *id.* at 310.

69. For example, John Stuart Mill, the utilitarian, avers "to the various modes of action, and arrangements of human affairs, which are classed, by universal or widely spread opinion, as Just or Unjust." JOHN S. MILL, *Utilitarianism*, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 1, 53 (Everyman's Library n.d.) (1st ed. 1863). One is: "It is confessedly unjust to break faith with any one: to violate an engagement, either express or implied, or disappoint expectations raised by our own conduct, at least if we have raised those expectations knowingly and voluntarily." *Id.* at 55 (emphasis omitted). But breaking the faith reaches beyond only expectations raised by contract and promise. "The notion of justice as fidelity . . . extends, in a rather indefinite way, to meeting legitimate expectations not derived from explicit voluntary

The source of this deep belief, whether it stems from nature or nurture, is subject to debate. On one side of the debate, the cognitive development theorists ascribe mainly to nature the disposition to valorize expectations.⁷⁰ Lawrence Kohlberg, a leading cognitivist, contends that, through genetically regulated programming, a person naturally evolves through invariant, sequential, hierarchical stages of moral cognition.⁷¹ In the highest stages, a person develops beyond the conception of fairness based on social convention and acquires a sense of objective fairness based on equality and reciprocity.⁷² As rational people will acknowledge, morality is basically governed by Kantian principles of universalized maxims and equal worth.⁷³ Mutual expectations are intrinsic to the "varying structures of moral judgment."⁷⁴ On the other side of the debate, the social learning theorists

agreement." Brian Barry, *Humanity and Justice in Global Perspective*, in *ETHICS, ECONOMICS, AND THE LAW* 219, 227 (J. Roland Pennock & John W. Chapman eds., 1982). David Hume, of utilitarian leanings, found justice, a product of artificial convention, to require government compliance with its rules, despite particular unjust applications, in order to secure expectations. See DAVID HUME, *A TREATISE OF HUMAN NATURE* 501-04 (L.A. Selby-Bigge ed., 1888) (1739); see also HAROLD J. LASKI, *THE STATE IN THEORY AND PRACTICE* 142-43 (1935) (noting that people "regard the sum of their expectations at any given period as the equivalent of justice"); HENRY SIDGWICK, *THE METHODS OF ETHICS* bk. III, § 2, at 268-71 (Dover Publ'ns, Inc. 1966) (7th ed. 1907) (providing a common sense idea of justice based on "natural expectations"). But cf. T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714, 1715 (1988) ("To the extent that it is accessible to human understanding, 'justice' can be defined as the consensus that people reach about who should be disappointed when expectations are incompatible."). Roger D. Masters, summarizing the conclusions of various social and biological scientists, among others, finds that "the defining characteristic of the sense of justice seems to be associated with behaviors or situations that depart from established expectations." Roger D. Masters, *The Problem of Justice in Contemporary Legal Thought*, in *THE SENSE OF JUSTICE: BIOLOGICAL FOUNDATIONS OF LAW* 1, 23 (Roger D. Masters & Margaret Gruter eds., 1992). Even primates reveal reactions based on expectations that may be the precursor to the sense of justice. See Frans B.M. de Waal, *The Chimpanzee's Sense of Social Regularity and Its Relation to the Human Sense of Justice*, in *THE SENSE OF JUSTICE: BIOLOGICAL FOUNDATIONS OF LAW*, *supra*, at 241, 241.

70. See, e.g., JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 87 (1990) ("[M]any of our expectations are rooted in nature, not in culture.").

71. See 2 LAWRENCE KOHLBERG, *THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES* 170 (1984).

72. See *id.* at 173.

73. See generally *id.* at 183; JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 13 (Marjorie Gabain trans., 1965). For the general features of the cognitive development theory of morality, see Bill Puka, *An Interdisciplinary Treatment of Kohlberg*, 92 *ETHICS* 468, 469-71 (1982). The feminist critique stemming from the work of Carol Gilligan challenges Lawrence Kohlberg's taxonomy of moral development. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1993).

74. See 2 KOHLBERG, *supra* note 71, at 73. One moral philosopher expresses the cognitive view this way: "And many of our expectations are rooted in nature, not in culture. So deep is our sense of injustice that it embitters our lives day in day out." SHKLAR, *supra* note 70, at 87.

ascribe one's moral consciousness mainly to nurture.⁷⁵ They contend that society's values, including the sense of justice, are instilled as one matures in comprehension and absorbs environmental influences.⁷⁶ But, in the end, regardless of whether the connection between expectations and the sense of justice is a matter of nature or nurture, or a combination of the two, the reality remains that the relationship is strongly felt.

E. Teleology

For a utilitarian, who, as a teleologist, subordinates any independent requirements of justice to the promotion of preferred consequences or utility,⁷⁷ the protection of expectations is often the linchpin of the law.⁷⁸ From a utilitarian viewpoint, the protection of expectations, reasonable or not, follows from the emotions they arouse and the reliance they induce.⁷⁹ A basic fact of human nature is that the dashing of expectations is painful,⁸⁰ arguably more so if the expectations

75. See Thomas E. Wren, *Social Learning Theory, Self-Regulation, and Morality*, 92 ETHICS 409, 411 (1982).

76. See *id.* at 409-12. For a general discussion of, and debate about, the normative aspects of the social learning and cognitive development theories, see *Symposium*, 92 ETHICS 407 (1982) (providing a symposium on moral development).

77. See, e.g., BRANDT, *supra* note 11, at 354-56; FRANKENA, *supra* note 11, at 14-16; RAWLS, *supra* note 11, at 24-26.

78. See Harry W. Jones, *The Jurisprudence of Contracts*, 44 U. CIN. L. REV. 43, 48 (1975) (quoting J. BENTHAM, *THEORY OF LEGISLATION* 126 (C. Atkinson ed., 1913)). Jeremy Bentham, "Mr. Utilitarian," advanced "security of expectations" as the purpose of a legal order. See *id.* "Law and government exist, said Bentham, to insure the security, that is, the practical realization, of the reasonable expectations of the men and women who constitute a given civil society." *Id.* A bill of rights, the criminal law, the law of property, and the law of contract (including "commercial transactions, partnerships, corporations, labor law and many more") are to protect expectations. *Id.*; see also ALAN RYAN, *PROPERTY AND POLITICAL THEORY* 98-99 (1984). "This is essentially Bentham's analysis and it has never been improved on." Jones, *supra*, at 48. In Bentham's own words, it is through the presentiment called expectation "that we have the power of forming a general plan of conduct." JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 68 (Richard Hildreth trans., 1975). "Expectation is a chain which unites our present existence to our future existence, and which passes beyond us to the generation which is to follow. The sensibility of man extends through all the links of this chain." *Id.*

79. See RYAN, *supra* note 78, at 98-99.

80. Morris Cohen, referring to "the principle of inertia in human affairs," opines: "Continued possession creates expectations in the possessor and in others, and only a very poor morality would ignore the hardship of frustrating these expectations and rendering human relations insecure, even to correct some old flaws in the original acquisition." MORRIS R. COHEN, *Property and Sovereignty*, in *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* 41, 50 (1933). Hume also agreed. See HUME, *supra* note 69, at 482, 502-05, 508-09; see also *infra* note 111 (providing a Holmes' quotation on adverse possession). To generalize, Karl Popper ties expectations to "the immensely powerful need for regularity . . . which makes [people] cling to their expectations dogmatically[,] and which makes them unhappy and may drive them to despair and to the verge of madness if certain assumed regularities break down." KARL R. POPPER,

are reasonable.⁸¹ When dashed expectations have induced reliance, the pain is probably accompanied by economic waste.⁸² This is not good. On the positive side, it is beneficial for society to protect expectations. This encourages people to invest in the future and thereby increase overall social utility.⁸³

OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH 23-24 (1972). Popper "assert[s] that every animal is born with expectations or anticipations, which could be framed as hypotheses; a kind of hypothetical knowledge. . . . This inborn knowledge, these inborn expectations, will, if disappointed, create *our first problems*." *Id.* at 258-59. These grounds for protecting expectations have both utilitarian and deontological overtones. Frustrating expectations causes pain, but it also infringes on autonomous choices by making the consequences of decision making less predictable. For the latter categorization, see Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 887 n.31 (1976) ("What else but a natural tendency in human beings to feel attachment to things they possess provides non-utilitarian justification for property rights?"). Margaret Radin is explicit in regard to certain property: "If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations." Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 968 (1982).

81. See SIDGWICK, *supra* note 69, bk. IV, § 4, at 442-43. Sidgwick writes that the evil of the disappointment of expectations is compounded "in proportion to the[ir] previous security . . . and many times greater in proportion as the expectation is generally recognised as normal and reasonable, as in this case the shock extends to all who are in any way cognisant of his disappointment." *Id.* at 443. This assertion by Sidgwick strikes the Author as too strong. Indeed, it may be a valid generalization, but the measure of disappointment is an empirical matter. There may well be instances in which the dashing of unreasonable expectations is exceedingly painful, more so than the dashing of some reasonable expectations. This observation connects to the standard criticism of utilitarianism that it fails to differentiate between socially desirable and undesirable sources of happiness or preference satisfactions. See Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859, 1868-71 (2000). It also connects to the assertion of many economists who turn to Paretianism on the basis of the impossibility of interpersonal utility comparisons. See Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 40 (1994).

82. Because expectations grounded on rights induce reliance (in fact, without legal rights economic planning would be fruitless), the utilitarian may reject purely act-utilitarian principles and recognize "the usefulness of previously established and generally applicable norms governing classes of circumstances and conferring rights." Kent Greenawalt, *Utilitarian Justifications for Observance of Legal Rights*, in ETHICS, ECONOMICS, AND THE LAW, *supra* note 69, at 139, 141. Nevertheless, "utilitarianism has a great deal of trouble accommodating rights." David Lyons, *Utility and Rights*, in ETHICS, ECONOMICS, AND THE LAW, *supra* note 69, at 107, 107. For discussion of the controversy surrounding the utilitarian position on rights, see generally, essays by David Lyons, Kent Greenawalt, R.M. Hare, Alan Gewirth, Richard E. Flathman, and George P. Fletcher, in ETHICS, ECONOMICS, AND THE LAW, *supra* note 69, at 107-215.

83. John Austin expresses this: "Now, as much of the business of human life turns or moves upon conventions [enforced by positive law or morality], frequent disappointments of those expectations which conventions naturally excite, would render human society a scene of baffled hopes, and of thwarted projects and labours." JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 332 (Library of Ideas 1954) (1st ed. 1832); see also STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 79-80 (1990) (connecting the traditions of Hume and Bentham with Hegel). For more on the utilitarian support for protecting

The utilitarian argument for deterrence also relates to expectations. Utilitarians favor the deterrence of harmful behavior as a means to increase aggregate welfare.⁸⁴ While the wrongdoer suffers a loss in utility because of the legal sanction, this loss is outweighed by the utility gained from the reduction in harmful behavior by others. For deterrence to be effective and useful, the potential injurer must reasonably expect her act to subject her to a sanction.⁸⁵ When the sanction is unforeseeable, the potential injurer endures a utility loss with no corresponding gain from deterrence because others in similar circumstances, unaware that the lesson applies, cannot learn from it.⁸⁶

F. Economics

Akin to the teleological justification for the protection of reasonable expectations is the justification often found in economic reasoning. For classical economists who ground economics in utilitarianism,⁸⁷ the justification for protecting reasonable expectations

expectations, see BARRY, *supra* note 15, at 101-02 (discussing the utilitarian position that the fulfillment of expectations results in gain); MILL, *supra* note 69, at 76 (explaining pains and pleasures of expectation); RAWLS, *supra* note 11, at 90-91 (explaining difficulties with "the principle of utility [which] requires us to maximize the algebraic sum of expectations taken over all relevant positions").

84. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158-62 (J.H. Burns & H.L.A. Hart eds., 1970) (describing situations in which punishment should not be imposed because the resulting evil is greater than any value gained, partially because the actor does not expect the sanction).

85. See, e.g., HOLMES, *supra* note 33, at 55 ("A fear of punishment for causing harm cannot work as a motive, unless the possibility of harm may be foreseen.").

86. On the other side of the coin, utilitarians, like deontologists, centralize expectations in their conception of proper conduct. "[F]or many consequentialists, including I believe all the classical utilitarians, rightness or wrongness of acts was not determined by the *actual* consequences of one's actions, but by the *expected* consequences—that is, the foreseeable consequences." Gerald Dworkin, *Intention, Foreseeability, and Responsibility*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 338, 346-47 (Ferdinand Schoeman ed., 1987). But cf. KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 98 (1987) ("Whether acts should be judged on the basis of foreseen consequences, foreseeable consequences, or actual consequences has always been a perplexing terminological point for an act utilitarian.").

87. See, e.g., POSNER, *supra* note 44, § 25.1, at 357 ("Bentham's utilitarianism, in its aspect as a positive theory of human behavior, is another name for economic theory."). Or perhaps utilitarianism is grounded in economics. See FRANK H. KNIGHT, *Some Notes on the Economic Interpretation of History*, in FREEDOM AND REFORM 246, 251 n.4 (1947) ("[U]tilitarianism and pragmatism virtually reduce all ethics to economics."). But Richard Posner has had second thoughts. See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 103 (1979) ("The important question is whether utilitarianism and economics are really the same thing. I believe they are not...."). Posner himself espouses a principle of wealth maximization. See POSNER, *supra* note 3, at 60-87 (distinguishing the concept of justice based on wealth maximization from utility maximization). But Posner also defends the free market and

tracks the argument above.⁸⁸ From this economic perspective, the main goal of the law is not to protect expectations per se, but rather to increase efficiency⁸⁹ which, as discussed above, is generally done best by embracing the principle of protecting reasonable expectations.⁹⁰ The principle, then, is an artifact of the aim to promote efficiency and as such it can be overridden for the sake of greater efficiency when circumstances call for it.

For those who ground economic reasoning on libertarian principles,⁹¹ the principle cannot be overridden in the name of efficiency. Libertarianism arises from a deontological orientation, not a teleological one.⁹² As seen in the discussion of the deontological justification for the principle, there is a tight nexus between liberty and reasonable expectations.⁹³ One's liberty to act is severely cramped, even impossible as a practical matter, if the legal consequences of one's choices are unpredictable. Economic reasoning is admitted as a means to protect individual liberty and autonomy, not to promote utility. Free, rational choices generally maximize individual utility, thereby aligning with economic postulates.⁹⁴ But, when an economic resolution of a conflict challenges personal liberty, such as when there is a clash

wealth maximization principles with a wide range of normative arguments, including autonomy and liberty principles. See *id.* at 65-76. Furthermore, Posner insists that he has "never argued, and do[es] not believe, that wealth maximization is or should be the only principle of justice in our society." Richard A. Posner, *The Ethics of Wealth Maximization: Reply to Malloy*, 36 U. KAN. L. REV. 261, 263 (1988). One may doubt Posner's contention. See Robin Paul Malloy, *The Merits of the Smithian Critique: A Final Word on Smith and Posner*, 36 U. KAN. L. REV. 267, 267-68 (1988); cf. Ernest J. Weinrib, *Utilitarianism, Economics, and Legal Theory*, 30 U. TORONTO L.J. 307, 315 (1980) ("One way, then, in which Posner's principle of wealth-maximization differs from utilitarianism is that it insists upon the monetization of all ethical phenomena.").

88. See discussion *supra* Part II.B.

89. See POSNER, *supra* note 44, § 25.1, at 357.

90. See discussion *supra* Part II.B.

91. Adam Smith, Friedrich Hayek, and Milton Friedman are among those economists who have championed the free market as a means to maximize personal liberty. See Robin Paul Malloy, *Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 OHIO ST. L.J. 163, 163-64 (1986).

92. For leading libertarian tracts, see, for example, FRIED, *supra* note 15, 170-71 (arguing that society "must respect the rights of the individual no matter how 'unfair' or 'inefficient' the resulting distribution of satisfactions"); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 33-35 (1974).

93. See discussion *supra* Part II.B.

94. See DAVID GAUTHIER, *MORALS BY AGREEMENT* 182 (1986) ("The received interpretation, commonly accepted by economists and elaborated in Bayesian decision theory and the Von Neumann-Morgenstern theory of games, identifies rationality with utility-maximization at the level of particular choices. A choice is rational if and only if it maximizes the actor's expected utility.").

between social welfare and individual freedom, it is the former that is renounced by the libertarian.⁹⁵

G. Miscellaneous

Two other legal and moral traditions also support the protection of reasonable expectations: the legacy from the natural law theorists,⁹⁶ and the classical Roman jurists.⁹⁷ There are additional reasons for the protection that do not fit clearly, or exclusively, into a particular moral tradition. When legal rules conflict with expectations, the citizenry may lose respect for the law,⁹⁸ or the courts.⁹⁹ Peaceful human interactions depend on expectations.¹⁰⁰

95. See FRIED, *supra* note 15, at 169-71; NOZICK, *supra* note 92, at 33 ("[N]o moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall social good.").

96. Notice the implications of Sir Frederick Pollock's comment regarding the natural law: Now St. German pointed out as early as the sixteenth century that the words 'reason' and 'reasonable' denote for the common lawyer the ideas which the civilian or canonist puts under the head of 'Law of Nature.' Thus natural law may fairly claim, in principle though not by name, the reasonable man of English and American law and all his works, which are many.

SIR FREDERICK POLLOCK, BT., *The History of the Law of Nature, in JURISPRUDENCE AND LEGAL ESSAYS* 124, 149 (A.L. Goodhart ed., 1961) (footnote omitted).

97. Pound harkens back to the idea of good faith of the classical Roman jurists and the philosophical jurists of the seventeenth century to place the protection of reasonable expectations as essential to a "civilized society." See POUND, *THE PHILOSOPHY OF LAW*, *supra* note 2, at 85-86; see also Paul A. Freund, *Social Justice and the Law*, in *SOCIAL JUSTICE* 93, 96 (Richard B. Brandt ed., 1962) ("Is not each of Justinian's precepts an instance of the fulfillment of reasonable expectations . . . ?").

98. "Respect for law, which is the most cogent force in prompting orderly conduct in a civilized community, is weakened, if men are punished for acts which according to the general consensus of opinion they were justified in believing to be morally right and in accordance with law." *State v. O'Neil*, 126 N.W. 454, 456 (Iowa 1910). "Justified expectations are also relevant in a . . . more intangible[] way . . ." *Miller v. Miller*, 237 N.E.2d 877, 886 (N.Y. 1968) (Breitel, J., dissenting). The basing of rights on the parties' beliefs regarding the law "exercises an influence in 'promoting an unconscious acceptance of legality and legal order.'" *Id.* (citation omitted). "A judicial decision denying compensation in defiance of a popular perception that it should be forthcoming risks undermining people's faith that, by and large, the law comports with their sense of justice." William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774, 1780 (1988). This leads to inefficient behavior. *See id.*

99. "[S]ince the [Supreme] Court lacks means of enforcement or control over a large budget, it must be particularly careful not to lose its symbolic authority by violating expectations." Peter Railton, *Judicial Review, Elites, and Liberal Democracy*, in *LIBERAL DEMOCRACY* 153, 160 (J. Roland Pennock & John W. Chapman eds., 1983).

100. In general, "[w]e are bound together by a set of mutually reinforcing strategic expectations." David Friedman, *A Positive Account of Property Rights*, 11 SOC. PHIL. & POL'Y 1, 10 (Summer 1994). More particularly, "[t]here exists, in all societies, a commonsense understanding of moral obligation that warns people of the dangers of trying to escape the constraints imposed by time. . . . [This] depends on the existence of the expectations of trust and

To summarize, our moral realm, even as revealed in this brief survey, provides a rich tapestry of overlapping and inconsistent principles and considerations that require social and individual choice for coherence. Society, and probably most individuals, are not up to the task of ordering all insistent values in a predetermined scheme. While general principles may be agreed upon, including the general principle of protecting reasonable expectations, particular circumstances may call forth considerations that dominate or reorder them. This is further demonstrated in the following discussion.

III. HARD CASES

There are situations in which the principle of protecting reasonable expectations seems inadequate to fully explain particular legal doctrine or the legal process. Additional principles, policies, and factors must be invoked to make sense of them. In this Part, hard cases are examined for the main principle to encompass satisfactorily the psychology of expectations; expectations based on incorrect legal advice; expectations contrary to established law; expectations in an unjust regime; expectations when the law is undeveloped or murky; actual expectations contrary to favorable reasonable expectations; and, expectations during periods of legal evolution.

A. *The Psychology of Expectations*

Expectations are aroused in particular circumstances. The frame in which the expectations are embedded affects their felt strength, independently of their underlying probabilities. Two of these influencing factors are examined in this Section: the desirability of the expectations, and the personal investment in the expectations. The question then arises whether these factors should carry weight in the decision as to whether the expectations warrant legal protection. In other words, do these factors have normative significance?

1. The Desirability of the Expectations

Assume that a person's expectations relate to two unrelated contingencies with the same substantial likelihood of eventuating. If the

solidarity that characterize civil society." ALAN WOLFE, *WHOSE KEEPER?: SOCIAL SCIENCE AND MORAL OBLIGATION* 44-45 (1989). Indeed, "[p]eace depends above all on stable expectations, and here as with other bargains, expectations are steadied by normative commitments and normative appeals." ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 240 (1990).

first contingency occurs, the person will gain \$10, while if the second one occurs, the person will gain \$10,000. Certainly this person is far from indifferent about which of the two contingencies eventuates. If asked which, if any, of the two expectations the person prefers to have legally protected, the person would certainly point towards the one with the higher payoff and may even pass on the one with the lower payoff. After all, \$10 is one thing and \$10,000 is quite something else. The difference, intuitively, does not simply stem from the practical consideration that the relative transaction costs regarding the two events are likely to diverge greatly in favor of the higher payoff. Even in the ideal world of costless interactions, our person may well say, "Forget the \$10 expectation, but protect the \$10,000 one."

This hypothetical suggests that the felt impact of expectations is affected by the desirability of the prospective payoff. This relates to Stephen Munzer's statement that "[p]ersons who have expectations . . . usually desire the expected event."¹⁰¹ Attitude connects to expectations.¹⁰² Arguably, then, a factor in determining whether an

101. MUNZER, *supra* note 83, at 29.

102. But Stephen Munzer's further contention that expectations are usually desired seems, at first blush, to run against the case of the contemplative criminal, who, according to the espoused definition of reasonable expectations, is looking for something, i.e., punishment, as her due, her just deserts. She is far from desirous of the satisfaction of these expectations and, indeed, has a strong desire that they remain unsatisfied. Munzer's point is not that, as a matter of fact, people put undesired contingencies out of their minds by means of cognitive dissonance and other reactions, *see* Kuklin, *supra* note 15, at 972-79 (providing a survey of these "irrationalities"), and therefore have diminished expectations regarding them, because, as he notes, "persons have expectations . . . even when they . . . are not thinking of the event predicted." MUNZER, *supra* note 83, at 28 (observing that expectations are "dispositional" rather than "occurrent"). In this regard, if we asked our criminal, she might say, statistics notwithstanding, that she does not expect to be punished. But putting it this way runs into Munzer's cautionary remark that the phrase "has expectations" is not quite equivalent to the verb 'expects.'" *Id.* at 29. Regardless of whether desirability is an intrinsic quality of expectations, the meaning of the principle that undesired expectations should be "protected" is far from self-evident. Certainly, the individual with the expectations would happily surrender the right to have them "protected." Even if the criminal demanded to be punished, it seems peculiar to say that her demand should be met in order to protect her expectations. If the state chooses not to prosecute her, it will not hear her complaints to the contrary. (Would this be a satisfactory response by the state?: "You should know of prosecutorial discretion and therefore your reasonable expectations must account for it." *See, e.g., Commonwealth v. Smith*, 427 N.E.2d 739, 742 (Mass. 1981) (explaining that the defendant's expectations must be tailored to the prosecutor's discretion)). It is not apparent who would have standing to raise the claim that the criminal's undesired expectations be protected. The state and the criminal's victim have their own, independent claims and expectations regarding the punishment. Therefore, in conclusion, even though it verges on a challenge to the Author's prior caution against confusing expectations and conation, *see* Kuklin, *supra* note 1, at 29-32, and whether expectations in some sense relate to undesired events, for the sake of clarity the principle that reasonable expectations are to be *protected* is deemed to relate only to desired events. While

expectation is reasonable, and therefore warrants legal protection, should be the degree of the desirability of the object of the expectation. In deference to human nature, to the extent that the disappointment of expectations of higher potential payoffs is felt disproportionately, the expectations counsel greater protection.¹⁰³ To put it another way, for contingencies with identical probabilities, the greater their (positive) value, generally the more "reasonable the expectation,"¹⁰⁴ or, to refine the thought, the greater the expectation of the person with normal human inclinations, the stronger the impetus for a normative claim.

The normativity of the claim based on felt impact stems mainly from utilitarian reasoning.¹⁰⁵ Based on the conclusion that the disappointment of the expectations regarding the larger return is felt disproportionately more than the smaller return, the utilitarian, driven by the concern to promote overall preference satisfaction,¹⁰⁶ would insist that this disappointment receive relatively greater legal protection. The deontologist, concerned with universalized principles respectful of the autonomy of others,¹⁰⁷ would have difficulty making out a case for the relevance of the extent of the felt impact on expectations. Regardless of whether the impact is slight or immense, principle mandates a consistent maxim of behavior protective of the interests of others. Corrective justice also overlooks the relevance of felt impact.¹⁰⁸ Blameworthy conduct injuring another person requires compensation, however great

the idea may be logically defensible, the Author shall forsake "negative protection" as not useful here.

103. As in the utilitarian, economic principle of loss spreading, whereby it is better, in being potentially less disruptive, that 1000 people suffer a loss of \$1 each than one person suffer a loss of \$1000, *see, e.g.*, CALABRESI, *supra* note 27, at 38, so too here does it appear proper to provide disproportionately greater protection for expectations of higher potential payoffs.

104. Mario Rizzo makes a similar point with respect to whether an event is considered foreseeable. The determination weighs both its likelihood and its impact, that is, the degree of its risk. *See* Mario J. Rizzo, *Uncertainty, Subjectivity, and the Economic Analysis of Law*, in *TIME, UNCERTAINTY, AND DISEQUILIBRIUM: EXPLORATION OF AUSTRIAN THEMES* 71, 88 n.20 (Mario J. Rizzo ed., 1979). "The expected value takes account of *both* the probability of the harmful event and the losses if it occurs ($p \cdot I$). Therefore, if the probability is low but the losses would be very high, the event still might be foreseeable." *Id.* For the view that foreseeability connects to expectations, *see supra* note 33 and accompanying text; *cf.* 3 JOEL FEINBERG, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* 101-04 (1986) (discussing the factors in determining the reasonability of taking a particular risk, and hence whether it is socially acceptable).

105. *See* Heidi Li Feldman, *Apparently Substantial, Oddly Hollow: The Enigmatic Practice of Justice*, 97 MICH. L. REV. 1472, 1476 (1999) (reviewing WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998)).

106. *See* Richard A. Posner, Book Review, 110 YALE L.J. 527, 534 (2000).

107. *See* Meir Dan-Cohen, *The Morality of Criminal Law: A Symposium in Honor of Professor Sandy Kadish: Basic Values and the Victim's State of Mind*, 88 CAL. L. REV. 759, 767 (2000).

108. *See* discussion *supra* Part II.B.

or small, based on returning the harmed person to the status quo ante.¹⁰⁹ Finally, none of the common candidates for either liberty-oriented or equality-oriented conceptions of desert for distributive justice seems to implicate the felt impact of expectations.

To reconnoiter, this analysis of the relationship between desirability and expectations turns first on the empirical question of whether the felt impacts of contingencies are actually disproportionately influenced by the degree to which they are preferred. Progress on this point will be left to psychologists. But, be this as it may, the bottom line is not that it is the desirability itself that justifies increased legal protection, but rather, it is the elevated expectations, heightened by the particular desirability of their objects, that are advanced as the basis for the warrant for increased legal protection. The warrant itself centers on utilitarian, consequentialist reasoning, not deontic concerns for justice, which appear indifferent to felt impact.

2. The Investment in the Expectations

Two of the factors that affect felt expectations turn on whether they arise in regard to something one already owns or possesses. As a psychological phenomenon, one values what one owns more than what one wants but does not have. In other words, one would charge more to sell what one has than one would pay to obtain it in the first instance. This has been called the "endowment effect."¹¹⁰ Similarly, one's

109. See *id.* The common law recognizes the principle of *de minimis non curat lex*. BLACK'S LAW DICTIONARY 431 (6th ed. 1990) ("The law does not concern itself about trifles."). While this may be justified on the basis of relatively wasteful costs of judicial administration, is there also some notion that insignificant harms are not worthy of protection?

110. Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 678-85 (1979); Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329, 339 (1986) ("All things being equal, goods that are included in the individual's current endowment will be more highly valued than those that have not yet been acquired."); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1150-52 (1986) ("Social psychologists have demonstrated that people sometimes value things once they have them much more highly than they value the same things when they are owned by others."); cf. Robert E. Goodin, *Theories of Compensation*, in LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS, *supra* note 24, at 257, 282-83 (noting the difference "between how much people are prepared to spend to protect certain things and how much they are prepared to insure them for"); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 401-03 (1981) (noting the difference between "asking price" and "offering price"). Hume perceived the essential idea: "Men generally fix their affections more on what they are possessed of, than on what they never enjoyed: For this reason, it would be greater cruelty to dispossess a man of any thing, than not to give it him." HUME, *supra* note 69, at 482; see also *id.* at 503-04. "One of the things on which almost all utilitarians, other than utopians like Godwin, agree is that there is an asymmetry between gains

expectations with respect to an object are aroused even when one is merely in possession of it. Irrespective of legal claims, the longer one possesses an object, the more one's expectations are informed by the belief that one will continue to possess it. The most famous expression of this idea is Holmes' defense of adverse possession.¹¹¹ The converse may also be generally true. Irrespective of one's legal rights, the longer one is out of possession of an object, the less one's expectations are influenced by the belief that one will regain possession.¹¹² To distinguish

and losses; losses do not simply leave us where we were before, but make us much worse off." RYAN, *supra* note 78, at 98. There are several closely related effects. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 14-15 (Daniel Kahneman et al. eds., 1982) (explaining "adjustment and anchoring"); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 67, 71 (Robin M. Hogarth & Melvin W. Reder eds., 1987) ("[C]hoices involving gains are usually risk averse, and choices involving losses are often risk seeking—except when the probability of winning or losing is small."); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 456 (1981) ("Outcomes are commonly perceived as positive or negative in relation to a reference outcome that is judged neutral."). See generally Kuklin, *supra* note 15, at 973-79 (discussing sources of "misdiscounting" when an individual "missetimates" predictions based on unknown probabilities).

111. See Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897). Holmes finds expectations among "the deepest instincts of man": "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it." *Id.* at 477; see also SCOTT GORDON, WELFARE, JUSTICE, AND FREEDOM 92 (1980) ("More broadly, the existence of expectations serves as the foundation of prescriptive claims, the argument being that when a status or a practice has persisted for some time, people have been led to expect that it will continue and have acquired a right to its continuance."). For further references, see *supra* note 69. Robert Ellickson also forwards the Tversky-Kahneman analysis to explain the law of adverse possession. See Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 38-39 (1989). As per Holmes' observation, the adverse possessor will begin to see the land "not as a prospect but rather as a vested right," at which time the loss would be felt "much more grievously than before." *Id.* at 39. The expectations of third parties may also be involved. See René Demogue, *Analysis of Fundamental Notions*, in MODERN FRENCH LEGAL PHILOSOPHY § 242, at 427 (Franklin W. Scott & Joseph P. Chamberlain trans., 1916) (noting that in order to secure transactions, "the owner of a right loses all or part of the advantages which it bestows when this result seems useful in the interest of a third person who can reasonably have believed that such a right did not exist"). The original owner's right "fades" with time. See Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 15-19 (1992).

112. See Ellickson, *supra* note 111, at 39. Ellickson argues that the expectations relevant to adverse possession also involve the true owner. See *id.* "The Tversky-Kahneman analysis is actually twice relevant in this context because during a period of adverse possession an absent true owner would likely be psychologically pulling up stakes, thereby becoming less likely to frame as 'a loss' the possible relinquishment of the land to the adverse possessor." *Id.* Along these lines, P.S. Atiyah notes: "[E]ven promises to return something which has been borrowed do not generate expectations as high as those generated by an extension of existing possession." ATIYAH, *supra* note 1, at 109 (citing WILLIAM GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE 87 (K.C. Carter ed., 1971) (1793)). These observations are not new. See BENEDICT DE SPINOZA, *The Ethics*,

this from the "endowment effect," where one owns the object, this might be called the "possession effect."

The question, then, is whether the endowment and possession effects should be taken into account in determining whether expectations are reasonable. In a word, "yes." Yes, that is, if one is driven by utilitarian consequentialism rather than deontic principle. As in the conclusion above regarding the desirability of the expectations, because the particular heightened (or reduced) expectations are normal and benign,¹¹³ the moral claims based on expectations are fully applicable. Takings law appears to agree.¹¹⁴

B. *Expectations Based on Ignorance of the Law*

The protection of expectations stemming from misapprehension of the law tests the reach of the principle. Against the principle is marshaled the maxim that ignorance of the law is no excuse.¹¹⁵ Yet this maxim has more bark than bite. In tort and contract law, this maxim is mainly invoked, but currently rejected, in cases of misrepresentation of the law.¹¹⁶ The maxim notwithstanding, excusable ignorance of the law of a minor character will not prevent a recovery in contract on the basis

in ON THE IMPROVEMENT OF THE UNDERSTANDING; THE ETHICS; CORRESPONDENCE 43, 196 (R.H.M. Elwes trans., 1883) (1st ed. 1677); 1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 354-60 (Alexander C. Fraser ed., 1894) (1st ed. 1690).

113. Being benign, they avoid Bruce Ackerman's concern. He objects to the blanket protection of "socially based expectations" because "the social institutions or practices that give rise to these expectations may themselves be unjust, inefficient, or otherwise inconsistent with supervening state objectives." BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 181 (1977). Hence, courts should "exercise a critical function, determining the extent to which one or another social practice deserves the support of the state's coercive power." *Id.*

114. Ellickson finds that "[s]everal strands in the current muddle of takings doctrine seem consistent with an unstated assumption that property that is psychologically vested is more worthy of protection than is property that is psychologically on the horizon." Ellickson, *supra* note 111, at 38. Ackerman may concur. In takings law he prefers, when possible, to adopt the view of the "Ordinary Observer" who "elaborates the concepts of nonlegal conversation so as to illuminate . . . the relationship between disputed legal rules and the structure of social expectations he understands to prevail in dominant institutional practice." ACKERMAN, *supra* note 113, at 15; *see also id.* at 31-42, 112.

115. *See, e.g.,* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAWS § 9.3.4, at 730 (1978).

116. *See* E. ALLAN FARNSWORTH, CONTRACTS § 4.14, at 258-59 (3d ed. 1999) (explaining that, despite older contract cases to the contrary, in claiming misrepresentation, "one is not conclusively presumed to know the law"); KEETON ET AL., *supra* note 24, § 109, at 759 (noting that, in spite of lip service to the older principle, "[t]he present tendency is strongly in favor of . . . recognizing that a statement as to the law, like a statement as to anything else, may be intended and understood either as one of fact or one of opinion only, according to the circumstances of the case," in the former instance, reliance on the misrepresentation being justified and actionable in tort).

of illegality,¹¹⁷ and it may even excuse performance of a contract on the grounds of impracticability.¹¹⁸ "The general rule seems to have arisen rather out of a deliberate policy requiring the parties to a bargain to deal at arm's length with respect to the law, and not to rely upon one another."¹¹⁹ In other contexts, when the ignorance of the law results in conduct injurious to the interests of another person, the court will reject ignorance as an excuse.¹²⁰ The rejection of the excuse in these cases often boils down to the conclusion that other policy considerations predominate. In the last instance, assuming the ignorance was "reasonable," the rejection of the excuse effectively signifies that, the "innocence" of the ignorant party notwithstanding, the claims of other, harmed parties are more insistent.

The rejection of the excuse of ignorance of the law is particularly troublesome when the ignorance comes from incorrect legal advice. A chief justification for the maxim is to encourage people to learn the law.¹²¹ This layperson took the proper step by consulting an attorney,¹²²

117. See RESTATEMENT (SECOND) OF CONTRACTS §§ 180, 198 (1981); FARNSWORTH, *supra* note 116, § 5.7, at 353, § 5.9, at 358.

118. See RESTATEMENT (SECOND) OF CONTRACTS § 266(1); FARNSWORTH, *supra* note 116, § 9.8, at 658.

119. KEETON ET AL., *supra* note 24, § 109, at 759; see also FARNSWORTH, *supra* note 116, § 4.14, at 259. The use of the maxim simply as an expedient to prevent recovery in misrepresentation cases becomes more obvious when one digs deeper and finds that inconsistent justifications have been offered for it. First, in light of the presumption that everyone knows the law, one cannot claim to reasonably believe a statement contrary to the law; "and second, that no man, at least without special training, can be expected to know the law, and so the plaintiff must have understood that the defendant was giving him nothing more than an opinion." KEETON ET AL., *supra* note 24, § 109, at 759.

120. For example, in declaring what an actor is required to know, the American Law Institute states: "For the purpose of determining whether the actor should recognize that his conduct involves a risk, he is required to know . . . the common law, legislative enactments, and general customs in so far as they are likely to affect the conduct of the other or third persons." RESTATEMENT (SECOND) OF TORTS § 290 (1965).

121. The most common, utilitarian rationale for the maxim that ignorance of the law is no excuse, given apologetically for slighting the claims of justice, is "the undesirability of providing citizens with a motive for remaining ignorant of the law." JOEL FEINBERG, *On Being "Morally Speaking a Murderer,"* in DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 38, 47-48 (1970); see also HOLMES, *supra* note 33, at 48 (noting that the explanation for the maxim is that "[p]ublic policy sacrifices the individual to the general good"); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 648 (1984); cf. 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE pt. 3, ch. 3, § 842, at 292 (5th ed. 1941) ("If ignorance of the law were generally allowed to be pleaded, there could be no security in legal rights, no certainty in judicial investigations, no finality in litigations.") (footnote omitted); John Austin, *Ignorance of Law*, in FREEDOM AND RESPONSIBILITY 359, 360 (Herbert Morris ed., 1961) ("But if ignorance of law were a ground of exemption, the administration of justice would be arrested."). See generally FLETCHER, *supra* note 115, § 9.3.4, at 730-31 (describing a case where the plaintiff "did everything in his power to determine whether

but was blindsided by the attorney's incompetence or the inherent difficulty of the issue.¹²³ Insofar as blameworthiness plays a role in our legal system, the claimant's conduct was exemplary. Her ensuing expectations certainly seem reasonable from her perspective. In this case, the modern law will go far to protect her, even in criminal matters.¹²⁴ But it will not go all the way. A court is not disposed to revise

posting the sign was legal in the jurisdiction"). Nevertheless, for discussion that citizens historically have been, and remain today, ignorant of the law, see FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM* 255 n.25 (1933) ("So true is this that if a private citizen has acquired a thorough knowledge of the law of the state he will usually belong to a class of shady gentlemen.") (quoting HERMANN KANTOROWICZ, *DER KAMPF UM DIE RECHTSWISSENSCHAFT* 13-14 (1906)); Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67, 87-89 (1987).

122. Studies show that citizens do not turn to lawyers very often. See Ellickson, *supra* note 121, at 89-90.

123. Compare these propositions of Aristotle and Hobbes regarding blameworthiness and ignorance of the law: "And we punish those who are ignorant of anything in the laws that they ought to know and that is not difficult, and so too in the case of anything else that they are thought to be ignorant of through carelessness . . . [.] ARISTOTLE, *supra* note 17, bk. III, § 5, and "if the Civill Law of a mans own Country, be not so sufficiently declared, as he may know it if he will; nor the Action against the Law of Nature; the Ignorance is a good Excuse: In other cases Ignorance of the Civill Law, Excuseth not." THOMAS HOBBS, *LEVIATHAN* 225 (Oxford Univ. Press 1952) (1651). The implicit reasoning evokes Fuller's "morality of law." See FULLER, *supra* note 13, at 42; see also DAVID A.J. RICHARDS, *THE MORAL CRITICISM OF LAW* 196 (1977) (distinguishing the maxim that ignorance of the law is no excuse from "[t]he principle of legality" which "provides that . . . a reasonably precise and fairly ascertainable statute must exist which makes certain conduct criminal").

124. See MODEL PENAL CODE § 2.04(3) (1985). George Fletcher reports that "the maxim 'ignorance of the law is no excuse' is riddled by formalistic exceptions." George P. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1270 (1985). Despite the perverse incentive from recognizing ignorance of the law as an excuse, "[t]he impulse to acquit mistaken defendants remains strong, . . . for it seems unjust to punish somebody who acts in good faith and in reasonable reliance on legal advice that her conduct conforms to the law." *Id.* Jerome Hall forwards a traditional analysis of the situation where the client is criminally prosecuted after following his attorney's advice, stating: "His plea of ignorance would nonetheless be invalid because the court before whom the case is tried cannot substitute the opinion of counsel for its own 'knowledge.'" See Jerome Hall, *Ignorance and Mistake*, in *FREEDOM AND RESPONSIBILITY*, *supra* note 121, at 365, 370-71. "Knowledge" of the law in this context means *coincidence with the subsequent interpretation of the authorized law-declaring official*. . . . If there is not coincidence, it can avail nothing that the defendant thought his conduct was legal." *Id.* at 371. Against those who, like Hall, claim that the misinformed defendant must be convicted, for otherwise "the individual's view of the law becomes tantamount to the law itself." Fletcher, *supra*, at 1270. Fletcher argues for another analysis whereby a mistake of law does not legitimate violating it, instead the mistake "merely negate[s] the mistaken individual's blameworthiness for violating the norm," *id.* at 1271, and hence, analogous to the defense of insanity, the acquittal "merely denies that it is just to hold the particular defendant liable for violating the norm." *Id.* Meir Dan-Cohen notes that "the maxim, far from being an exhaustive statement of the law, is in reality a mere starting point for a complex set of conflicting standards and considerations that

established law in order to protect these misguided expectations. Though the court may find a way to ameliorate the consequences to the misinformed person,¹²⁵ here the principle of protecting reasonable expectations often yields to weightier considerations, including the reasonable expectations of other affected parties who are not misinformed of the law.¹²⁶ In the end her expectations are ruled to be unreasonable, their justification overridden by other norms.

C. *Expectations Contrary to Known Law*

All legal systems doubtlessly have some rules that are contrary to the dictates of justice and utility.¹²⁷ Such a rule may result from one of the quirks of the legal process, say, a poorly reasoned opinion that becomes ensconced by undeliberated adherence to precedent. Or perhaps the rule stemmed from a shallow anticipation of its consequences, or grew out of a social vision that is now seen as confused or inadequate. Can expectations kindled by principles of justice and utility, but contrary to the known law, ever be considered reasonable?

A similar question arises from the fact that social mores and practices, or the recognized custom and usage of a trade, may be inconsistent with established law. While one may doubt the efficacy of laws that run contrary to practice,¹²⁸ the case remains that the courts occasionally confront expectations aroused by practice yet unsupported by law.¹²⁹ When this occurs, should the law defer to the expectations?

One consideration may be disposed of swiftly. If expectations are protected, one need not worry about the perverse incentive to remain ignorant of the law.¹³⁰ The expectations protected are those of the

allow courts to avoid many of the harsh results that strict adherence to the maxim would entail." Dan-Cohen, *supra* note 121, at 646.

125. *See supra* notes 123-24.

126. *See, e.g.*, FLETCHER, *supra* note 115, § 9.3.4, at 730-31.

127. *See* Thomas D. Perry, *Dworkin's Transcendental Idea*, in 7 *MIDWEST STUDIES IN PHILOSOPHY: SOCIAL AND POLITICAL PHILOSOPHY* 255, 266 (Peter A. French et al. eds., 1982) ("Yet there are many unfair or otherwise immoral rules that are also certainly part of the law, and there are great numbers of cases and unlitigated questions that fall unproblematically under them.").

128. *See, e.g.*, Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 *WIS. L. REV.* 1, 5 ("Laws opposed to [commercial] practice are unlikely to change practice, but will, when haphazardly and occasionally applied, condemn what should be encouraged.").

129. *See id.* (arguing that commercial conduct is not necessarily determined by law and may be the product of "practices . . . the community perceives as normal and desirable").

130. *See supra* note 121.

reasonable person in the shoes of the claimant.¹³¹ The courts will ascribe to this person a passing knowledge of the law that overlooks calculated ignorance.

Now, to respond to the questions above, the answers are "yes, sometimes." Expectations can be reasonable though they run contrary to known law. For them to be reasonable, they must, unlike the purely conative inclinations such as desire or wish, derive from information. In the definition of reasonable expectations, several sources of information are cited and suggested. The most important source, usually dispositive, is the law on the books.¹³² If a reasonable person, with her passing knowledge of the law, has expectations contrary to established doctrine, they must arise from sources outside the lawbooks alone: "the currently accepted morals, mores, customs and usages, and, in sum, the general social milieu."¹³³ The reasonable person knows and expects these sources outside the law narrowly conceived to be placed in the judicial balance.¹³⁴ When they weigh more heavily than the law on the books, the court should, pursuant to the feedback mechanism, revise the books. The doctrine of desuetude, whereby a law that has fallen into disuse may not be selectively enforced,¹³⁵ exemplifies the triumph of expectations over existing rules.¹³⁶ The justice and utility of protecting a

131. See Fletcher, *supra* note 124, at 1270.

132. See, e.g., J.M.F. Trucking, Inc. v. Carburetor & Elec. of Lewiston, Inc., 748 P.2d 381, 390 (Idaho 1988) (relying on Prosser's definition of "reasonable expectations").

133. Kuklin, *supra* note 1, at 25.

134. David Lyons mentions the "controversial" proposition that, when justice demands, "a judicial decision [may] be justified, *all things considered*, even when it is contrary to a decision that is required by law." DAVID LYONS, *Derivability, Defensibility, and the Justification of Judicial Decisions*, in MORAL ASPECTS OF LEGAL THEORY: ESSAYS ON LAW, JUSTICE, AND POLITICAL RESPONSIBILITY 119, 120 (1993). In light of commonly accepted judicial practices, the Author does not find this controversial, assuming by "law" he means law narrowly conceived.

135. See, e.g., Comm. on Legal Ethics v. Printz, 416 S.E.2d 720, 724 (W. Va. 1992) ("Desuetude, like vagueness, is based on the concept of fairness embodied in the due process and equal protection clauses."); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 17 (1982) (referring to the doctrine "of desuetude in its narrow sense of requiring some kind of prior notice to be given before a long-ignored criminal law was resurrected and used against a defendant"); HANS Kelsen, PURE THEORY OF LAW 213 (Max Knight trans. 1967) ("[A] legal norm may lose its validity by never being applied or obeyed—by so-called *desuetude*. *Desuetudo* may be described as negative custom, and its essential function is to abolish the validity of an existing norm."); cf. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 143-56 (1962) (discussing the doctrine of desuetude in the context of *Poe v. Ullman*, 367 U.S. 497 (1961), the case about a Connecticut anti-birth-control statute).

136. Relatedly, Fletcher discusses, without resolving, the "antinomy [of self-consciousness that] arises in every case in which the criteria of involuntariness affect liability for a criminal act or undermine the validity of a private legal transaction." Fletcher, *supra* note 124, at 1283; see also *id.* at 1280-84 (referring to the example of cases of undue influence and duress in which the

person's reasonable expectations outweigh the need to preserve the letter of the law when the citizenry do not take it seriously.¹³⁷

D. *Expectations in an Unjust Regime*

Let us examine more closely the problem of expectations supported by justice and utility though contrary to established law. "Reasonable expectations" refers partially to probabilities and not, as suggested by one of the relevant dictionary definitions of "expectations," solely to matters of one's due.¹³⁸ While a reasonable person may correctly believe that justice and utility are distinctly on her side, she may also have to face the unfortunate state of affairs that other factors, located in the general social milieu, are not in the least bit sympathetic to her legal claim. In an age more kind and just, things might turn out differently, but this is not that age. Under such circumstances, for her to believe that her claim will be vindicated is unreasonable in the probabilistic sense meant here.¹³⁹

There is something wrong with this conclusion. After all, justice and utility are posited to be on her side. A legal theory that rejects this as sufficient grounds for legal protection seems deficient. But there are

succumbing party's expectation of contractual invalidity undermines the claim that her will was actually overborne). The actor's levels of reasoning result in a regress of expectations about expectations about expectations, etc., that cannot be simply eliminated. *See id.* at 1282-83.

137. Ackerman writes that, even when some people still take seriously the letter of the law, the utilitarian would apply this criterion to the question of enforcement: "[I]f the utility gained by denying legal protection exceeds the utility lost in disappointing social expectations, then the reliance interest should not be protected, while otherwise it should be." ACKERMAN, *supra* note 113, at 198.

138. For the notion of legally protecting reasonable expectations, these are the two most relevant senses of expectations identified by the *Oxford English Dictionary*: "A[2.]b. The looking for something as one's due . . . ; in *pl.* what one looks for or requires[;] one's (mental) demands. . . . 8. The degree of probability of the occurrence of any contingent event." 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 928 (1971); *see also* Kuklin, *supra* note 1, at 23. The gist of the relevant senses of "expectation" is that, first, "expectations refer to a person's mental state regarding a future, contingent event relating to 'one's due' or entitlement," and "[s]econd, the person implicitly has sufficient information about the contingency to forecast its likelihood, and thereby probabilistically 'foresee' it to some extent." *Id.*

139. In discussing a "legitimate expectation," Munzer asserts that it must conform to "the fundamental principles of the legal system as a whole." MUNZER, *supra* note 83, at 223. "[T]his is expressly a notion of institutional rather than moral legitimacy. Under fugitive slave laws, slaveowners probably had rational and institutionally legitimate expectations regarding the return of runaway slaves. But the expectations were not morally defensible." *Id.* Harris persuasively argues that an improper property interest in whiteness stems from the expectations originating in the period of American slavery. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1729-30 (1993). Some insist that the protected expectations should be benign. *See supra* note 113.

other considerations. One reason this may not be enough is that there also is another side to the claim. The expectations of our person's antagonist are also informed by this unkind and unjust age. Possibly the age is not so out of joint that the reasonable antagonist fully appreciates the underlying normative thrust, and therefore has expectations free of moral compunctions.¹⁴⁰ Yet the antagonist may not be so innocent. For one possibility, the antagonist may be uncomfortable with the fact that his rights are based on a morally weak or untenable position, but, he may understandably rationalize under the circumstances that he did not create these conditions and has done nothing to promote them directly, so hence should be able to take advantage of the existing legal regime or doctrine as do many others.¹⁴¹ His expectations and the associated expectations of his supporters and dependents are quite explicable in

140. See, e.g., *Jersey City Printing Co. v. Cassidy*, 53 A. 230 (N.J. Ch. 1902). In this case, the court granted an injunction that restrained former employees of the complainant who were on strike from interfering with the employer's business. See *id.* at 231. The court defended the employer's right to the injunction in terms of the need to protect its "probable expectancy," for otherwise, without this general protection, "civilization as at present organized may go down." *Id.* at 233. But, "[a]s social and industrial life develops and grows more complex, these 'probable expectancies' are bound to increase," and therefore the courts, as part of the inevitable legal evolution designed to meet the changing needs, "will discover, define, and protect from undue interference more of these 'probable expectancies.'" *Id.* The "probable expectancies," not yet clearly defined in this area, are framed by resort to the standard of the reasonable person which applies equally to employer, employee, and prospective employee. See *id.* at 233-34. Without reference to authority on point, the court breathlessly defines the particular "expectancies" to be protected as those located in "the freedom of the employer to employ, or of the employ   to be employed (in either of which cases there is an interference with the enjoyment of a 'probable expectancy,' which the law recognizes as something in the nature of property)." *Id.* at 234. Today, these defended "probable expectancies" would strike us as quaint and out of touch with current norms. Other "probable expectancies" now dominate.

141. For a related issue, Munzer distinguishes legitimate expectations from rational expectations. "The legitimacy of an expectation within a legal system depends on whether the expectation is supported, first, by the underlying justifications of the laws inducing it, and second, by the fundamental principles embedded in the legal system itself." Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 432 (1982). A rational expectation depends on its likelihood alone. For example, an expectation is rational but illegitimate "where a person shrewdly calculates that he can take advantage of some provision of the law" though the loophole is contrary to the spirit of the law or the legal system. *Id.* "The point of having a separate requirement of legitimacy (in both senses) for protecting expectations is to permit a frustrating change that is, even if a surprise, not improper, because of the way the change is connected with the justificatory structure of the institution." *Id.* at 432-33. Perhaps the concerns for the claims of the beneficiary of an unjust precedent are overblown: "The perpetuation of an unjust precedent is, in effect, the commission of an injustice to yet another party, whereas the failure to perpetuate an unjust precedent may visit no unfair disadvantage on the party who otherwise would have won." DAVID LYONS, *Formal Justice and Judicial Precedent*, in *MORAL ASPECTS OF LEGAL THEORY: ESSAYS ON LAW, JUSTICE AND POLITICAL RESPONSIBILITY*, *supra* note 134, at 102, 117. Therefore, "from a moral point of view . . . judicial commitments to follow precedents [may not] have proper application when the precedential decisions themselves were unjustly decided." *Id.*

light of the state of affairs. If expectations are to be protected at all, these particular ones also seem worthy of weight in the judicial scales.¹⁴² Insofar as the antagonist actively participates in the establishment and promotion of the unkind and unjust institutions involved, or as his advantage-taking approaches exploitation, or as he intentionally engenders previously unprotected expectations in the plaintiff,¹⁴³ weight should be taken from his pan on the judicial scales.

On the other hand, the court may in fact take no weight from the non-innocent antagonist's pan on the judicial scales if it sits in an evil regime,¹⁴⁴ or if the issue relates to one of a generally just society's moral

142. Feinberg confronts the tradeoff: "To change the rules in the middle of the game, even when those rules were not altogether fair, will disappoint the honest expectations of those whose prior commitments and life plans were made in genuine reliance of the continuance of the old rules." Joel Feinberg, *Rawls and Intuitionism*, in *READING RAWLS* 108, 117 (Norman Daniels ed., 1989). In contemplating a rule change, he would consider, among other things, "the degree of unfairness of the old rules and the extent and degree of the reliance placed upon them." *Id.* But very often one finds a situation of conflicting legitimate claims, so "that whichever judgment is reached it will be unfair to someone or other." *Id.* Even extremely fair rule changes do not avoid the problem of disappointing expectations: "There is an inevitable dissonance between even the fairest of public reforms and established private expectations." SHKLAR, *supra* note 70, at 120. Because someone's expectations will be displaced, thereby provoking her sense of injustice, "[e]very social change, every new law, every forced alteration of public rules is unjust to someone. The more drastic and sudden the change, the greater the grievances." *Id.*

143. Some commentators analyze products liability law by means of the "representational" theory of consumer protection whereby the consumer expectations are protected that are aroused by the producer through advertising, packaging, image-making, etc. *See, e.g.*, Leon Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 *TEX. L. REV.* 1185, 1188-89 (1976) (noting that "sections 402A and 402B of the *Restatement* support a communicative tort action . . . designed for the protection of consumers against sellers who market products . . . that are misrepresented"); Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 *VA. L. REV.* 1109, 1370 (1974) ("Judgments of liability for consumer product disappointment should center initially and principally on the portrayal of the product which is made, caused to be made or permitted by the seller."). For additional support, see *RESTATEMENT (SECOND) OF TORTS* § 402A cmt. i (1965) ("The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."). This goes beyond the leading article on contract damages by Fuller and Perdue that promotes the grant of damages to protect reasonable expectations not as a goal, but rather as a means to protect the reliance interest that may be difficult to determine. *See Fuller & Perdue, supra* note 3, at 53-66. This justification is repeated by some modern commentators. *See, e.g.*, FARNSWORTH, *supra* note 116, § 1.6, at 17; Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 *HARV. L. REV.* 741, 787 (1982). The justification is criticized by others. *See, e.g.*, CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 4 (1981); Barnett, *supra* note 3, at 275; Joel Levin & Banks McDowell, *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*, 29 *MCGILL L.J.* 24, 58-61 (1983) (explaining the "tort theory of contract").

144. Even favored participants in evil regimes may have dubious expectations aroused by established law. For example, despite the retroactivity of the judgment of the Nuremberg Tribunal, though the Nazi defendants could not "have foreseen the precise content of the norms applied at

blind spots. Notwithstanding the antagonist's misgivings and malfeasance, the court may protect his interests because, for example, it will have no truck with the claimant because of who she is. The Third Reich, the European decimations of native peoples in the Americas, and the period of slavery in America are brought to mind.¹⁴⁵ In times like this, the standard of reasonable expectations, despite its normative aspect, relegates the social pariah to hopelessness.¹⁴⁶ So much the worse for this standard.¹⁴⁷

Nuremberg, they should have known—most of them did know—that their conduct was so contrary to basic civilized norms that if Germany lost the war a terrible retribution would be visited on them.” RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 332-33 (1990). Robert Nozick also looks to Nazi Germany to exemplify the point that “[t]here are ways other than through actual prior announcement that a person should have known he would be punished for a wrong.” ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 391 (1981).

145. For a moral examination and comparison of these three atrocities, see James P. Sterba, *Understanding Evil: American Slavery, the Holocaust, and the Conquest of the American Indians*, 106 *ETHICS* 424, 425 (1996).

146. As James Nickel points out, though “one aspect of justice may be the provision of security for reasonable expectations, people’s expectations may be secure in orderly but terribly unjust societies.” James W. Nickel, *Justice in Compensation*, 18 *WM. & MARY L. REV.* 379, 387 (1976).

147. See MUNZER, *supra* note 83, at 433-35. Because of problems such as these, Munzer allows “large utility gains and various principles of justice” to override rational and legitimate expectations. *Id.* at 435-39. Yet something can even be said for the protection of established expectations in evil empires, such as those in the Nazi regime. See Stephen W. Ball, *Book Review*, 6 *LAW & PHIL.* 135, 140-41 (1987) (reviewing RONALD DWORKIN AND *CONTEMPORARY JURISPRUDENCE* (Marshall Cohen ed., 1984)). But, once again, society prefers to protect only benign expectations. See *supra* note 113. The American legal system, despite its warts and scars, does not currently face the quandaries of oppressive regimes, though the constitutional law of privacy may not have adequately anticipated possible pockets of oppression. For the “legitimate expectation of privacy” test in privacy law, Justice Harlan concurred in *Katz v. United States*, 389 U.S. 347 (1967), with a positivistic principle that the party must have an actual, subjective expectation, and that society must recognize this expectation as reasonable. See *id.* at 361 (Harlan, J., concurring). Radin points out that this test created difficulties for the Court. Radin, *supra* note 80, at 999. “For example, if the government announced that the police may search a citizen’s bedroom with impunity, well-informed citizens could no longer reasonably expect privacy in their bedrooms.” *Id.*; see also Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 *HARV. L. REV.* 511, 523 (1986) (noting that courts could “decree[] that all legal rules are subject to change, in which case there could never be a contrary claim of entitlement based upon [reliance and expectations arising from] positive law”). This is akin to the point that one cannot have reasonable expectations that are contrary to established law. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740-41 n.5 (1979). The Supreme Court coped with this by declaring that a “normative inquiry would be proper” in privacy law. *Id.* at 741 n.5. The extent of this inquiry has not yet been worked out. See Radin, *supra* note 80, at 1000; cf. Kaplow, *supra*, at 525 (“[T]he fact that legal change is expected does not imply that compensation is never appropriate in response to that change.”). This normative inquiry, however, can be purely empirical. In the context of Radin’s hypothetical, the inquiry might be: “Do in fact the ‘currently accepted morals, mores, custom and usages, and the general social milieu’ support the citizen’s expectations of privacy in the bedroom despite the government declaration to the contrary?” See Radin, *supra* note 80, at 999. The answer of the courts in the Third Reich would not be the same as ours.

E. Expectations When the Law Is Undeveloped or Murky

When a reasonable person examining the relevant legal materials can formulate only a dubious opinion of the controlling rules,¹⁴⁸ it seems peculiar to base a later judicial pronouncement on the protection of ensuing expectations.¹⁴⁹ The examiner might find that the legal sources are exceedingly scanty, or that they are rich with inconsistency, as where two contradictory lines of authority endure in apparent unawareness of one another.¹⁵⁰ In these and other circumstances, the legal sources are unlikely to balance evenly. In most cases, if not all, they will point weakly toward the position on one side or the other,¹⁵¹ so that it does appear that the expectations aroused in one of the persons by these sources meet the probabilistic standard of reasonable expectations that they be more likely than not. Nevertheless, since the foundation of

148. Karl Llewellyn "guesstimate[s]" that a careful, skilled attorney can correctly predict the outcome of cases on appeal "eight times out of ten, and better than that if he knows the appeal counsel on both sides or sees the briefs." KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 45 (1960). Llewellyn submitted this judgment to quiet "the ferment among the intellectuals" stirred up by the attack on legal certainty launched by the legal realists. *Id.* But notice the implication of this oil on troubled waters. There are a substantial number of instances where even the careful, skilled practitioner mispredicts legal consequences. Beyond this, in marginal cases, some of the correct predictions through Llewellyn's means will result from random luck. The latest version of the realists' attack on legal certainty comes from the post-modern deconstructionists. See generally J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 755 (1987); Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371, 390-92 (1992). For examples of the oil poured on these newly troubled waters, see Umberto Eco, *Interpretation and Overinterpretation: World, History, Texts*, in 12 THE TANNER LECTURES ON HUMAN VALUES 141, 144 (Grethe B. Peterson ed., 1991); Stanley Fish, *Play of Surfaces: Theory and the Law*, in LEGAL HERMENEUTICS 297, 307-08 (Gregory Leyh ed., 1992). The waters still roil. For the uninformed layperson in cases such as these, does the notion of "reasonable expectations" have any useful meaning?

149. For an analysis of some of the issues in this and the next two subsections, see MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 110-13 (1988). His analysis of "jagged doctrine[s]," defined as those which "lack[] substantial congruence with applicable social propositions," *id.* at 110, 111, is introduced: "The coupled values of protecting justified reliance and preventing unfair surprise are also normally no better served by preserving a jagged doctrine than by overruling it." *Id.* at 110.

150. For a reference to such inconsistent lines of authority, see *Windust v. Dep't of Labor & Indus.*, 323 P.2d 241, 248 (Wash. 1958) (Donworth, J., concurring) ("Thus we have two irreconcilable lines of decisions of this court in which we have reached inconsistent conclusions as to the application of [the workers' compensation statute] to persons suffering heart attacks while in the performance of extrahazardous work.").

151. Under Ronald Dworkin's "right answer" thesis, the balance would (almost) never be in equipoise. See RONALD DWORIN, *Is There Really No Right Answer in Hard Cases?*, in A MATTER OF PRINCIPLE 119-44 (1985) (discussing weaknesses of the "no right answer" theory). See generally POSNER, *supra* note 144, at 197-219 (analyzing Dworkin's theory "that there are right answers to even the most difficult and controversial legal questions").

the expectations is so flimsy, it seems unsatisfactory to erect upon it alone a legal judgment justified by the high principle of protecting reasonable expectations.

The law may, in effect, not even point weakly in any direction. The common citizen oftentimes has an insufficient basis for any view of the state of a particular legal question.¹⁵² For technical or unusual legal questions, she probably has had no occasion to examine even casual legal sources that would shed light on the matter. Nor, in the usual case, has she had reason to seek legal advice. While she might believe the law is on her side, wishful thinking may be the primary reason. Even when she might know objectively that the law weighs somewhat against her, cognitive dissonance and related phenomena may lead to more sanguine expectations.¹⁵³

Notice that for some of these cases one could accurately state that all the evidence from the law, both narrowly and broadly conceived, points towards the expected outcome. Nevertheless, the principle of protecting reasonable expectations may not be very compelling in these instances. The evidence, though univocal, amounts to a mere whisper. While a whisper resounds more than does studied silence, one can hardly insist that it alone should suffice to unbalance the scales of justice otherwise in virtual equipoise. Moral and legal principles speak with compelling authority only when more substantially founded.

F. Actual Expectations Contrary to Favorable Reasonable Expectations

A person may incorrectly believe that the law, narrowly or broadly conceived, does not support her position. Because the standard for the reasonability of her expectations turns on a situated objectivity, her incorrect belief may be quite sensible. Though at the time her claims originate or vest she believes the law does not protect her, once a dispute arises she will be informed to the contrary if she bothers to seek

152. Some legal realists claim that the norm is ignorance of the law. See, e.g., JOHN CHIFMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 100 (2d ed. 1927) ("Practically in its application to actual affairs, for most of the laity, the Law, except for a few crude notions of the equity involved in some of its general principles, is all *ex post facto*."). Time has not altered this judgment. "Both American and foreign studies show (not surprisingly) that modern populations know abysmally little about law and legal systems. Most people['s] ... information (and misinformation) comes mostly second-hand," as from popular culture, such as television shows. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 *YALE L.J.* 1579, 1593 (1989) (footnote omitted).

153. See Kuklin, *supra* note 15, at 976 (noting that "an expected or preferred conclusion bends appraisals towards being supportive").

legal counsel. At the same time, suppose that her antagonist's reasonable expectations also are that his position is not backed by the law, but rather that his opponent's position is so backed. The antagonist may even be the cause of the first person's ignorance that her interests are legally protected. For example, she might believe that she has no claim against the antagonist because she takes at face value a liability disclaimer provision in their contract that he inserted while knowing it to be unenforceable. Another, less egregious, aspect of this problem appears when one compares the claim grounded on the protection of reasonable expectations of the person deceived by this unenforceable disclaimer to the claim of another person, similarly situated, who is not deceived because she previously knew of the established legal rule declaring the disclaimer unenforceable. The law must be wary of protecting claims simply because the claimant is legally sophisticated.¹⁵⁴ On the one hand, perhaps all of these incorrect expectations should be juristically ignored. At least some of the parties, those who would benefit thereby, will gladly forego the "protection" of them. On the other hand, the problem is framed: Is the principle of protecting reasonable expectations relevant, coherent, or morally defensible in cases where parties have reasonable, but inconsistent, beliefs about whether their interests are protected?

In the context of the test for protecting expectations of privacy with respect to search and seizure, these conundrums are avoided. Here, the requirement is that there be both an actual, subjective expectation and

154. Alan Schwartz raises related problems in analyzing cases over disclaimers in consumer contracts. He finds that "[t]he object of the judges in these cases is not to find out what the buyer's understanding of the terms in fact was, and to protect it, but to ascertain what the buyer should have expected the terms to be." Alan Schwartz, *The Private Law Treatment of Defective Products in Sales Situations*, 49 IND. L.J. 8, 35-36 (1973). "Yet courts seldom infer, or consider the possibility of inferring, that the apparent pervasiveness of this custom [by sellers of contractually shifting risks to buyers] may mean that buyers should ordinarily expect some form of disclaimer," even when the clause is unread. *Id.* at 37. "Finally, the scant empirical evidence we do have about buyer expectations indicates that consumers frequently expect to bear personal injury losses themselves." *Id.* Schwartz later quotes Llewellyn for the proposition that a court should not enforce the terms of an adhesion contract, but rather those terms "which a sane man might reasonably expect to find on that paper. The background of trade practice gives a first indication." *Id.* at 43 (quoting K.N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 704 (1939) (reviewing O. PRUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937))). Schwartz tellingly retorts that "a 'sane man' dealing with a powerful seller might expect harsh clauses, particularly if 'trade practice' is to use them; and if such clauses are actually unexpected, and therefore unenforced, strong sellers will only make them visible because their buyers cannot easily refuse." *Id.*

an objective, reasonable expectation of privacy.¹⁵⁵ In principle, if the person does not actually expect privacy, the search and seizure is proper despite objective expectations to the contrary.¹⁵⁶ Though inconsistent with the reach of the general principle of protecting reasonable expectations voiced by courts and commentators, adopting this two-prong test would dissolve some of the conundrums, but not all of them. Search and seizure cases involve the expectations of one party in a criminal action, the defendant,¹⁵⁷ whereas the larger problem involves the expectations of at least two parties in a civil suit, the plaintiff and the defendant.

Let us revise the expectations of the second party, the antagonist, in the hypotheticals above. Assume that rather than expecting his interest to be unprotected, instead he reasonably believes, as does the first party, that his interest is protected. It is not until both parties seek legal counsel that they learn of an esoteric rule, say, the Rule in Shelley's Case,¹⁵⁸ that surprisingly protects the first party. Surprising to these two laypersons, but not to the initiates who learn in their first year of law school that the Rule in Shelley's Case is one of the galaxies in the legal firmament (though perhaps made of dark matter invisible to the nonadept) that will doubtlessly endure forever, or at least until this dispute runs its course. In this case the reasonable expectations of the antagonist, supported by those of the first party, will clearly be disappointed. From the perspective of the first party, her expectations will be "disappointed," though they are reasonable under the circumstances—for example, the grant explicitly left the property to the antagonist—because the conflict will be settled in her favor. All this

155. Under the Fourth Amendment shield from illicit search and seizure, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

156. The phrase "in principle" is used because the Supreme Court has been criticized for failing to examine the actual, subjective expectation of defendants, and instead resolving the issue on the basis of objective, reasonable expectations alone. *See Morris, supra* note 3, at 820-24.

157. *See, e.g., Smith v. Maryland*, 442 U.S. 735, 739-41 (1979) (noting that a defendant invoking the protection of the Fourth Amendment can claim that the defendant's "'legitimate expectation of privacy' . . . has been invaded by government action").

158. The following textual argument makes it clear that an explanatory footnote of this rule is unnecessary for the usual readers of law review articles. For the laypersons among the readers perusing this Article for its entertainment value, see, for example, CORNELIUS J. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY: AN HISTORICAL BACKGROUND OF THE COMMON LAW OF REAL PROPERTY AND ITS MODERN APPLICATION* §§ 1-4, at 141-50 (2d ed. 1988) (discussing "the Rule in Shelley's Case").

leaves the principle of protecting reasonable expectations subordinated to other norms.¹⁵⁹

G. *Expectations During Periods of Legal Evolution*

Let us turn to the typical setting in which the principle of protecting reasonable expectations is unlikely to be invoked. When the doctrine in issue is clear-cut, well-established, well-known, and entrenched,¹⁶⁰ the courts typically reaffirm it by perfunctory reference to statutory or case law, without including further justification rooted in an overarching legal principle or public policy.¹⁶¹ As a practical matter, resort to the principle of protecting reasonable expectations, or to any other general principle, is superfluous. The discussion immediately above also suggests that when a doctrine is clear-cut, well-established, and entrenched, though not well-known, the courts also will summarily

159. Even here, the court may construe the legal doctrine in such a way as to protect the expectations of the laypersons. For example, even brighter in the legal firmament than the Rule in Shelley's Case is the Rule Against Perpetuities. Yet Justice Tobriner, in scrutinizing a standard clause in a commercial lease, rejects the rigid or remorseless application of the latter Rule: "Surely the courts do not seek to invalidate bona fide transactions by the imported application of esoteric legalisms. Our task is not to block the business pathway but to clear it, defining it by guideposts that are reasonably to be expected." *Wong v. DiGrazia*, 386 P.2d 817, 823 (Cal. 1963).

160. One must not overemphasize the immutability of the law. Even a relatively stable topic, such as property, is subject to changes owing to expectations. See C.B. Macpherson, *The Meaning of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 1 (C.B. Macpherson ed., 1978) ("The changes [in the meaning of property] are related to changes in the purposes which society or the dominant classes in society expect the institution of property to serve.").

161. The fact that the rule is established in itself gives it moral force. See *supra* note 15 (setting forth Fried's defense). Ch. Perelman, applying his "principle of inertia in the life of the mind," insists that "[t]he fact is, the rule of justice results from a tendency, natural to the human mind, to regard as normal and rational, and so as requiring no supplementary justification, a course of behaviour in conformity with precedent." PERELMAN, *supra* note 56, at 86 (footnote omitted). Hence, "every deviation, every change, will have to be justified." *Id.*; see also OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 290 (1920) ("[I]mitation of the past, until we have a clear reason for change, no more needs justification than appetite."); SALTMAN, *supra* note 33, at 150-51 ("The law, in its constant striving to maintain logical consistency and achieve a high standard of predictability, does not keep pace with ongoing changes in social mores."); J.L. Mackie, *Rules and Reason*, 1 LAW & PHIL. 291, 301 (1982) (regarding "the main structure of a society or its legal system: there is always a presumption in favour of stability or only gradual change"). But see JUDITH JARVIS THOMSON, *Killing, Letting Die, and the Trolley Problem*, in RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 78, 84 (William Parent ed., 1986) ("There is no Principle of Moral Inertia: there is no prima facie duty to refrain from interfering with existing states of affairs just because they are existing states of affairs."). The problem with this "conservative justice," as Sidgwick refers to it, is that the protection of the "natural expectations" aroused by existing law will freeze legal developments, even when the law is seen as unjust. See SIDGWICK, *supra* note 69, bk. III, at 271-73; see also David Lyons, *Formal Justice, Moral Commitment, and Judicial Precedent*, 81 J. PHIL. 580, 583-85 (1984) (discussing the role of mistaken judgments under the formal justice argument which entails the "principle of conservative justice").

affirm it, although perhaps with some misgivings or regret for disappointing understandable expectations to the contrary. Indeed, perhaps all the "hard cases" discussed relate to shortcomings in one or more of these four elements.

When a court affirms an existing doctrine with a protracted justification, the knowledgeable reader suspects there is fire beneath the smoke. The court, feeling heat, is uneasy about summarily disposing of the issue as a routine matter. Social or normative discontent apparently has fanned a spark that the court is trying to extinguish or evade, though this may be a temporary expedient before capitulation.

To clarify this situation, let us return to our evil regime or unjust legal doctrine. They do not endure forever. Assume a period of broad dissatisfaction when an unjust doctrine is under way. The person on the street starts to empathize with the person who correctly believes that her unprotected claim is founded on justice and utility. While her prediction of vindication in court has been bleak, and hence expectations of protection were unreasonable in at least the probabilistic sense, society is gaining deeper understanding and moral maturity. During this process of social change, her claim before a court is increasingly supported by her expectations of vindication. From her point of view, it was bad enough that she had to wait at all,¹⁶² but concerns for the reasonable expectations of those with conflicting interests weighed against her. Now that forces outside the law narrowly conceived court change, the judicial scales sway as the claimant's expectations add weight and the antagonist's expectations lighten. Along with the substance subtracted from the antagonist's pan because of his misgivings and malfeasance, controversy about the particular doctrine cuts down his moral and legal ground. As the winds of change swell, the expectations backing the antagonist's interests become less reasonable, and the claimant's expectations become more reasonable. Yet not to be forgotten is that, because of the standard of situated objectivity, sometime during this evolutionary legal process, near the cusp precipitating the swing, it may be accurately stated that the inconsistent expectations of the claimant and the antagonist are both reasonable.

162. The modern history of civil rights challenges the case for waiting. "The difficult question of fairness arises when theory conflicts with widely held long-standing beliefs. There we may have to move carefully. (Though I am uncomfortable with delay. Think of all the specious arguments for gradualism on civil-rights issues.)" Lawrence C. Becker, *Property Rights and Social Welfare*, in *ECONOMIC JUSTICE: PRIVATE RIGHTS AND PUBLIC RESPONSIBILITIES*, *supra* note 61, at 71, 82.

Throughout this evolutionary process, the standard of reasonability remains that of a person aware of "the currently accepted morals, mores, customs and usages, and, in sum, the general social milieu"¹⁶³ and not that of an abstract ideal foreign to the functioning society. Presumably this society has come to embrace general principles of utility, justice, and perhaps others such as kindness, compassion, and solidarity that compose the shadings suggested by the distinctions between misfeasance and nonfeasance, advantage-taking and exploitation, truth-telling and disclosure, etc. Our claimant's neglected claim may have stemmed not from the nonrecognition of the general principles, but rather their nonimplementation. Society may have fended off redistributive claims with the reasoning that the necessary state apparatus is likely to do more bad than good, more injustice than justice.¹⁶⁴ Or the claimant's unanswered demand may have been due to the judgment that her situation falls outside the reach of established procedures. But now society's moral understanding and focus have sharpened or evolved. Reasonable expectations drive the conclusion that it is time for a revision of the law.¹⁶⁵

In other words, under this scenario, the relative weights of utility arguments, but not direct justice ones, shift during the evolutionary process. Justice considerations remain unalterably supportive of the claimant's position throughout. Justice does not require social recognition or endorsement, but rather exists as an independent precept. Utility, on the other hand, is situated partially in social context. Expectations, even those aroused by unjust doctrine, give rise to reliance. Dashed expectations and thwarted reliance produce disutilities, irrespective of the merits of their underlying basis. Therefore, as society moves towards recognition of the fairness of the claimant's position, the

163. See Kuklin, *supra* note 1, at 25.

164. See David B. Wong, *Coping with Moral Conflict and Ambiguity*, 102 ETHICS 763, 764-65 (1992) (explaining that libertarians often argue for the absolute importance of property rights on the grounds of "the ineffectiveness and undesirable side effects of state attempts at redistribution of wealth and income"). For examples of this libertarian tactic, see Richard A. Epstein, *Justice Across the Generations*, in JUSTICE BETWEEN AGE GROUPS AND GENERATIONS 84 (Peter Laslett & James S. Fishkin eds., 1992); Richard A. Epstein, *Luck*, 6 SOC. PHIL. & POL'Y 17, 23-36 (Autumn 1988).

165. Pound describes the social dynamic this way: Once existing conflicts are resolved, "new demands and new expectations arise and press upon the legal order persistently until we learn how to do something about them." ROSCOE POUND, JUSTICE ACCORDING TO LAW 17 (1951). But, as a preventive, "[c]onduct has to be channeled, habit and expectation have to be molded so as to avoid or reduce the development of conflict, as new situations of fact raise divergent expectations." *Id.* The recognized ends or purposes of social control "are not constant. As they change new expectations arise and bring about new conflicts." *Id.*

antagonist's reasonable expectations and resulting reliance diminish, as the claimant's increase, leading to a shift in the utility calculus of the consequences of doctrinal revision. At some point, utility calculations loosen their grip from the pan of justice.

IV. CONCLUSION

Much can be said for the principle of legally protecting reasonable expectations. But not everything can be said for it. In some situations there are normative and practical arguments that seem to outweigh the virtues of the principle. Yet, despite these exceptional situations, the principle does retain its claim as a powerful force driving the law. To say nothing of the usually strong support of justice arguments, the disappointment of reasonable expectations is too disruptive of personal and business affairs, and even public affairs, to take a back seat to other considerations unless they are exceedingly weighty. So the principle solidly deserves its place near the pinnacle of legal precepts. As a beacon on high it illuminates much of the law. Still, even though it properly deserves its elevated position, the principle, as argued elsewhere, works poorly as a spotlight when invoked to resolve close legal issues. Reasonable expectations are inherently too nebulous, too unfocussed, to do the difficult jobs in the courtroom. Nevertheless, society must admit the principle into the courtroom, and into the floor of the legislature. As an opening argument it goes far to identify some of the main concerns of society, even though it does little to close the debate.
